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No. 499

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IN THE

Supreme Court of the United States

October Term, 1943.

PATRICIA R. O'BRIEN, *Petitioner,*

vs.

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL, EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN, AND RICHARD J. WHELAN, EXECUTORS UNDER THE WILL OF ELIZABETH GRAVES O'BRIEN, DECEASED; THE FIDELITY & COLUMBIA TRUST CO. AND THE LOUISVILLE TRUST COMPANY, CO-ADMINISTRATORS OF THE WILL ANNEXED OF JOHN A. O'BRIEN, DECEASED; AND EDWARD J. O'BRIEN & CO., A CO-PARTNERSHIP COMPOSED OF EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN; AND EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN AND RICHARD J. WHELAN, EXECUTORS UNDER THE WILL OF ELIZABETH GRAVES O'BRIEN, DECEASED, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY AND SUPPORTING BRIEF.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	2
Summary and Short Statement of the Matter Involved	2
Statement of Basis of Jurisdiction	16
Questions Presented	19
Reasons Relied on for Allowance of Writ	20
Brief in Support of Petition for Writ of Certiorari.	
I. Factual Background	25
II. Argument	39
Conclusion	41

TABLE OF AUTHORITIES.

Statutes Cited—Kentucky Civil Code of Practice.

PAGE

Carroll's Kentucky Civil Code, Sec. 528..... 39

Carroll's Kentucky Civil Code, Sec. 737..... 40

B. & O. R. R. Co. v. U. S., 298 U. S. 349, 80 L. Ed. 209, 56 S. Ct. 797..... 39

Brinkerhof—Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451..... 39

Edwards-Barnard Co. v. Pflanz, 115 Ky. 393, at p. 403, 73 S. W. 1018..... 40

Georgia Railway & Electric Co. v. Decatur, 295 U. S. 165, 55 S. Ct. 701, 79 L. Ed. 1365..... 39

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265 39

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 S. L. R. 406..... 39

Petroleum Exploration v. Public Service Commission, 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834. 38

Railroad Commission v. Pacific Gas & Electric Co., 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334..... 39

Saunders v. Shaw, 244 U. S. 317, 64 L. Ed. 1163, 37 S. Ct. 638..... 41

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124 41

Washington Ex. Rel. Oregon Railroad Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.. 41

Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914 39

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY AND SUPPORTING BRIEF.

To the Supreme Court of the United States, and to the Honorable Chief Justice and Associate Justices Thereof:

The petitioner, Patricia R. O'Brien, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Kentucky entered in the above styled cause and respectfully shows the Court:

Summary and Short Statement of the Matter Involved.

The petitioner seeks to have this Honorable Court review the judgment of the Court of Appeals of Kentucky as expressed in the opinion of the Court reported in 294 Ky. 793, 172 S. W. 2d 595. This is the final opinion in the case by the Court of Appeals of Kentucky. It is the opinion "as modified and extended on denial of rehearing March 26, 1943, as extended on denial of further rehearing June 25, 1943." The Court of Appeals of Kentucky rendered three opinions in this case, all three of which are contained in the record herein.

This action was instituted in the Circuit Court of Jefferson County, Kentucky, by Mrs. Patricia R. O'Brien, sole beneficiary of the will of her late husband, John A. O'Brien to rescind an executed contract of sale of his interest in the partnership of Edward J. O'Brien & Company, upon the ground of fraud and deceit. It is prosecuted against his former partners, who are his brothers, and the executors of the will of his mother who had also been his partner. The administrators with the will annexed of John A. O'Brien, who declined to bring the suit, are also parties defendant. The case involves much more than a simple bargain and sale (Court of Appeals of Kentucky opinion, p. 2). The Chancellor denied the plaintiff's prayer for relief and she appealed to the Court of Appeals of Kentucky, which affirmed the judgment.

Three of the six members of the Court of Appeals of Kentucky considering the case were of the opinion that the plaintiff was entitled to a rescission of the sale or to an adjustment of the equities on, four items: (1) profits of the company for 1935, amounting to $17,185.07; (2) increase during that year in the value of stocks and bonds owned by the company, $22,262.05; (3) excess of appraised

over book value of the property, plants and equipment of subsidiary companies, $8,890.51; and (4) interest due from Edwin J. O'Brien, Jr., upon a deficiency in a proper proportion of the capital and a large overdraft, resulting in the company having to borrow money which it would otherwise not have had to do, $36,477.70.

A petition for rehearing on the extended opinion was filed, as a result of which the opinion of the Court of Appeals was further extended on June 25, 1943, at which time the said Court denied petitioner's claim that in these proceedings she had been deprived of due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

The litigation grew out of the sale by Patricia R. O'Brien of the partnership interest of her deceased husband to James G. O'Brien, a brother of the deceased, under unusual circumstances.

The contract sought to be rescinded "was between strong business men of large influence on the one side, and a widow, inexperienced in business and finance, on the other," according to the findings and opinion of the Court of Appeals of Kentucky (Opinion, p. 2). The business of the partnership is "probably the largest of its kind" (Opinion, p. 2). "It is that of loose leaf tobacco brokers and wholesale merchants, with its principal office in Louisville. It has branches in other states and connections and transactions abroad" (Opinion, p. 2). "In addition to large investment in the physical properties of the firm and those of its wholly owned subsidiaries, and seasonably in tobacco, the company held title to stocks and bonds averaging through the course of later years around $1,000,000 in value. It appears that some of the personal affairs of each partner was handled by the company's bookkeeping staff or was cleared through his account."

The firm consisted of the following, with their respective capital interests, namely: the mother, Mrs. Elizabeth G. O'Brien, fifteen per cent, and each of the four sons, Edwin J. O'Brien, Jr., Joseph B. O'Brien, James G. O'Brien, and John A. O'Brien, 21¼% (Opinion, p. 2).

Edwin J. O'Brien, Jr., was the manager of the business. John A. O'Brien was the youngest son. He was taken into the partnership in 1919 with a full 12% interest in the company (Tr., Vol. 12, p. 1070, q. 9), and after learning the business under the apprenticeship of his father, became a tobacco buyer in 1922 (Tr., Vol. 12, p. 1133, q. 10). As such he was engaged in buying tobacco for the firm's account at various places, including Georgia, North Carolina, South Carolina, Tennessee, and Kentucky (Tr., Vol. 12, p. 1133, q. 10). For nearly ten years John was in charge of all buyers of Edward J. O'Brien & Co. (Tr., Vol. 2, p. 111, q. 10; Vol. 12, p. 1113, q. 248). During this time, on September 27, 1925, John was married to Patricia R. O'Brien and they lived together until his death, January 1, 1934 (Tr., Vol. 2, p. 110, qs. 3-5).

Article 5 of the partnership agreement provided: "The death of any partner hereto shall not terminate the partnership." Article VI: "In the event of the death of any partner his or her interest shall remain in said partnership until Five (5) years after such occurs," (Court of Appeals opinion, p. 4). In the meantime a deceased partner's interest "shall be a silent partner only and shall not be entitled to participate in the management and the personal representative shall accept statements rendered by the partnership as final and conclusive" (Article 6, Court of Appeals opinion, p. 4). Article 6 reads: "In the event the estate elects to withdraw from the partnership at the expiration of Five (5) years, then the interest of said decedent shall be the value of the interest, as shown by the books of the company, or by appraisement, plus profits and interest if any" (Same opinion, p. 4, and Exhibit 24).

"It is necessary to refer to some apparently shameful occurrences for an understanding of conditions and negotiations for the purchase and sale of the estate's interest" (Court of Appeals opinion, p. 4). "For some time there had been an estrangement between John and his brothers, especially Edwin and Joseph" (Opinion, p. 4).

According to a friend, "he had not spoken to his two brothers since their father's death in 1928" (Opinion, pp. 4-5). John became ill in 1933. He went to the firm's office for the last time in April, 1933 for a day or so but he did not continue because of the attitude and mistreatment of his brother, Edwin (Opinion, p. 5). On the afternoon of June 20, 1933, while his wife was absent for a half hour or so, John disappeared from home. Mrs. O'Brien and her attorney, Leo T. Wolford, went to the company's office that afternoon to inquire about her husband and Edwin refused to tell them anything. Mrs. O'Brien located him at the home of his brother Joseph. She and two friends went there the next morning but were denied admittance, being told by both Mr. and Mrs. Joseph B. O'Brien that he "was too ill to see anyone" (Opinion, p. 5). "They had the same experience on a later visit. On both occasions there were four khaki-clad armed men in the hall and on the outside. Mrs. O'Brien tried repeatedly to see her husband or talk with him over the telephone but she did not succeed" (Opinion, p. 5).

"On August 3 she found him in the Seelbach Hotel in a dying condition" (Court of Appeals opinion modified and extended March 26, 1943). His doctor testified that "He had not expected him to live through the night" (Opinion, p. 5). There is no intimation of any other than an affectionate relation between John and his wife (Opinion, pp. 5 and 6).

Sometime during this period of incarceration, apparently July 7, 1933, "John executed a trust agreement with

the Louisville Trust Company as trustee, undertaking to dispose of the proceeds of $200,000.00 life insurance. It omitted his wife, who was named in the policies as either sole beneficiary or an annuitant during her life. These policies, or most of them, had been acquired in 1929, within less than three years of his marriage. The trust was for the benefit of any child or children, but if none lived to be 25 years of age or had died without descendants the entire trust estate was payable 'in equal shares to such of the blood relatives of the assured as shall then be partners in the firm of Edward J. O'Brien & Company.' On the same day John A. O'Brien executed a will bequeathing to his wife his automobile, household goods, and one-half of his personal estate, 'including one-half of my interest in the partnership of E. J. O'Brien & Company.' The disposition of the remainder was the same as that provided for in the trust agreement. The will made special reference to the terms of Article 6 of the partnership agreement and provided that the Trust Company, as trustee under the will, should receive testator's share of the profits during the five-year period.

"The execution of these papers is surrounded by mystery. George D. Caldwell, Vice President and Trust Officer of the Louisville Trust Company, testified that in the afternoon of July 7 he was called by Joseph Laurent, attorney, since deceased, and told he was sending John A. O'Brien to see him. When he arrived he had already executed the will, with Laurent and L. M. Disselkamp as witnesses. He asked Caldwell to examine the trust agreement and then it was signed by O'Brien and by Caldwell, on behalf of the Louisville Trust Company as trustee. Their signatures were witnessed by two persons. Caldwell took O'Brien to the Vault department and introduced him to the superintendent. He obtained a safety box and deposited the two instruments there. None of the three liv-

ing witnesses to these documents or the vault superintendent testified. Caldwell did not refer to John A. O'Brien's mental or physical condition. It does not appear that Laurent had ever been O'Brien's attorney. He had had a safety box jointly with his wife at another bank for several years. The trust agreement recited that O'Brien had caused six listed insurance policies to be deposited with the Trust Company. As a matter of fact they were never deposited. A significant thing is that the instrument listed a policy for $30,000 which had been cancelled and re-issued as two policies, with different numbers, for $20,000 and $10,000, respectively. The record shows that John A. O'Brien's insurance premiums had been paid by the company and charged to his account, so it is a reasonable inference that the records of the firm still showed the original policy numbers and amounts. The policies themselves were at his home. Another thing of significance is the probability that John A. O'Brien would not leave any child surviving him, so that the trust and will both were for the benefit of his brothers, the widow receiving from his estate substantially only what she would be entitled to under the law upon renunciation of any will" (Opinion, pp. 6-7).

"Several weeks later John A. O'Brien set about diligently to undo what had been done and to revoke the trust. Without detailing the telephone conversations between Mr. Caldwell and Mrs. O'Brien, or certain letters of the two men, it seems sufficient to say that O'Brien revoked the trust and Caldwell returned to him the executed copy which the company had retained. O'Brien also notified at least some of the insurance companies that any trust he had undertaken to make had been revoked, and in December executed forms irrevocably designating his wife as sole beneficiary, with the exception of one policy. The one not so changed was for $50,000 and provided, in accordance with one of its options, for the payment of the

proceeds to the widow in monthly installments and if any part remained in the hands of the company at her death the balance to the insured's children, but if none to his mother, sister and brothers. In view of his actions with respect to the whole matter, we are persuaded this policy was overlooked" (Opinion, pp. 7-8).

John A. O'Brien executed a will bearing date of September 22, 1933 (although apparently acknowledged before the witnesses in October) as follows: "I give to my wife, Patricia R. O'Brien, all of the household furniture and all of the personal property of my estate."

The tension between the parties was made more acute when Mrs. Patricia O'Brien ordered James O'Brien from her home in November and refused to let him see John, who was ill. A friend testified that John had said he did not want any of his brothers to come there.

This was the situation when John A. O'Brien died, January 1, 1934.

"When Mrs. O'Brien and her attorney presented the will of September 22d for probate, they learned that Thomas A. Barker, who had been the attorney for E. J. O'Brien and Company for many years, had requested an officer of the Court to notify him if any will should be presented since he had 'a later will.' It was disclosed at the probate proceeding that John O'Brien had a safety box with the Louisville Trust Company.

"The opening of the box revealed the will of July 7, 1933 (Ex. 16), which was offered for probate by the Louisville Trust Company, named as executor. It was probated with the will of September 22d as a codicil (Ex. 17). Mrs. O'Brien nominated the Fidelity & Columbia Trust Company as administrator with the will annexed, and the Louisville Trust Company asked that it be appointed. Both were named as co-administrators (Ex. 18).

"O'Brien's copy of the insurance trust was also in the box. Passing the disputed testimony as to the acts and statements of Barker at the time, it is pretty well established that Caldwell stated that the trust had been revoked, and that Barker questioned its revocation. Mr. Barker admits advising the Trust Company that he did not consider the trust legally revoked and he would insist on its being executed. Thereupon Mr. Caldwell notified the several insurance companies of the existence of the trust and that a claim to the proceeds of the policies would be made under it. However, one company paid Mrs. O'Brien $50,000 before it received this notice. This action had the effect of holding up payment of $150,000 proceeds of the other policies to Mrs. O'Brien as beneficiary. It was not until May, 1935, about 14 months later, that definite steps were taken toward suing to recover the insurance proceeds. Suggestions were then made (by whom in the first instance is not clear) that there could be no settlement of that issue without a settlement of the estate's interest in the partnership. Mrs. O'Brien was insisting that she did not want to dispose of that interest and that the insurance matter should be handled separately, while representatives of the O'Brien brothers were insisting upon joint consideration. Her attorneys seem to have been of the opinion that the propositions must be considered together. In the beginning, representatives of the brothers, and perhaps of the Louisville Trust Company, were suggesting if not threatening a contest of the will of September 22d, and also contending that it should be construed as devising the widow only the household furniture and other personal effects of like character, with no interest in the partnership passing under it. All these claims were through or by Barker and Joseph Laurent, who, it appears, was representing the O'Brien brothers as well as the Louisville Trust Company" (Opinion, pp. 9-10).

The foregoing paragraphs have been quoted directly from the Court of Appeals' opinion, particularly because of the sentence therein contained that the Court found the foregoing "a fair statement of the conditions."

The "purchase of the interest, according to the record, was by James G. O'Brien individually, but his brothers, through the attorneys for all three of them, conducted the negotiations and all joined in the contract of settlement" (Opinion, p. 11).

"The petitioner contends that unfair threats and unconscionable pressure were brought to bear upon her, not only in relation to the affairs of the partnership business but in the matter of the insurance trust and her husband's will" (Court of Appeals opinion, p. 13).

"Negotiations for a settlement began in June, 1935, eighteen months after John A. O'Brien's death. There was submitted to Mrs. O'Brien and her attorney a memorandum (referred to in the record as Exhibit 22) showing the 'present interest of the estate to be $425,649.45' " (Court of Appeals opinion, p. 14). Petitioner claimed that Exhibit 22 upon which she relied as the O'Brien partners' representation of the value of her deceased husband's partnership interest, understated such value to the extent of $297,558.39.

PLAINTIFF'S EXHIBIT No. 22.

Present Interest		$425,649.45
Real Estate	$331,873.95	
Pro Rate based on capital....	23.77%	78,886.44
		$346,763.01
Her ⅓ Life Interest Real Estate 23¼% of $78,886.44		18,341.10
		$365,104.11
Depreciate wholly owned subsidiaries 50% $252,500 at 50%—$126,250 at 23.77%		30,009.62
		$335,094.49
Remainder Interest in $50,000 Life Ins....		17,500.00
		$317,594.49
½		$158,797.25

The petitioner was told that her interest in the partnership would be settled for $158,797.25. This was what the O'Brien brothers offered her through their lawyer, Tom Barker. This figure was arrived at as follows:

$425,649.45 was supposed to be the market value of John A. O'Brien's interest in the partnership at the time of his death, but the partnership assets included real estate of $331,873.95, The figure of 23.77% was taken as John A. O'Brien's share of the partnership. The O'Brien brothers claimed that under the will she was not entitled to any of the real estate and therefore his share of the real estate should be deducted, to wit, $78,886.44, leaving $346,-763.01. She was given credit for dower of one-third life interest which approximated 23.25% of $78,886.44 or $18,341.10, raising her interest to $365,104.11; however, this figure would include the subsidiaries as full book value whereas it was claimed by the O'Brien brothers that these subsidiaries were worth only 50% of the book value. Since

the book value was $252,500, 50% of that, the depreciated value would be $126,250 and 23.77% would amount to $30,009.62 to be deducted from $365,104.11, or $335,094.49. It was claimed that Patricia O'Brien was to receive a full $50,000 in cash on one of the life insurance policies which carried a contractual obligation in favor eventually of her brothers-in-law, mother-in-law and sister-in-law, and that remainder interest of $17,500.00 deducted from the $335,-094.49, gave her $317,594.49. As a flat figure they offered her $158,797.25, or one-half of the above amount.

The O'Briens were adamant in refusing to settle the matter piecemeal. Moreover, they threatened through Tom Barker that if she did not sell her interest for the figure of $158,797.25, they would incorporate and freeze out her husband's interest so it would not be worth $100,-000. Other claims were made attempting to coerce the settlement through a sale by her of the partnership interest. Suit was threatened on the insurance trust. They threatened a suit to construe the last will as giving her only personal effects. She was finally offered $350,000 (Tr., Vol. 2, pp. 227, 267, 271, 272; Vol. 6, pp. 669, 670, 671).

Mrs. O'Brien expressed a desire to have an audit made. Mr. Barker, counsel for the O'Brien brothers, replied that the O'Briens would not allow it. She never was permitted to have access to the original books of the partnership but she was provided with audits for 1933 and 1934. The 1928 to 1933 audits were delivered one day and returned in the afternoon to O'Briens' counsel on demand.

The attorneys for the O'Brien brothers who presented Exhibit 22 to Mrs. O'Brien stated that the figure $425,-649.45 was the market value of the interest of John A. O'Brien in the Edward J. O'Brien & Company (Tr., Vol. 2, p. 208, q. 191, p. 213; Vol. 6, p. 670, qs. 61 and 64, plaintiff's Exhibit 22).

This figure did not represent the value, market or otherwise, of the interest of John A. O'Brien in the Edward J. O'Brien & Company and this fact was known to the brothers O'Brien. The details of the fraud inherent in this document will be discussed in sufficient length with appropriate references to the record at pertinent and proper places *infra.*

After considerable negotiation and delay Patricia R. O'Brien finally sold her husband's interest in the partnership to the brothers O'Brien on the basis of the value of John's interest as shown by this fraudulent document, plaintiff's Exhibit 22, and being coerced into so doing by threats from the brothers O'Brien, based principally on the insurance trust agreement and the will obtained from John A. O'Brien while he was held at the home of Joseph under armed guard. The price finally paid for the interest of John A. O'Brien was $380,000 (Exhibit 28).

Thereafter upon learning of the fraud which had been perpetrated against her, Patricia R. O'Brien brought the action referred to. Obviously in order to prove one of the necessary elements of fraud and deceit it was necessary for Patricia R. O'Brien to prove the actual value of John's interest in the partnership at the time of the sale and at the time the representations were made to her. Equally obvious is the fact that in order to do this the books and records of the company intending to establish these values should have been available to Patricia R. O'Brien for the purposes of evidence.

Prior to the taking of the testimony, Mrs. O'Brien applied for a subpoena *duces tecum* to the Circuit Court. This called for the production of many books and records of Edward J. O'Brien & Company and its four subsidiaries for the period from November 1, 1928, to December 31, 1938.

"Motion for Subpoena Duces Tecum.

"Plaintiff, Patricia R. O'Brien, moves the Court to direct the issuance of a subpoena *duces tecum* summoning defendant, Edwin J. O'Brien, Jr., to attend and appear before the Court on March 1, 1940, at 10:00 A. M. and to bring with him then and there certain books, records and papers of original entry, hereinafter specifically named, or their equivalents if called by any other names, of defendant, Edward J. O'Brien and Company, and its four subsidiaries, Tobacco Rehandling Company, Ltd., Inc., H. N. Martin Leaf Tobacco Company, Western Tobacco Company, and Standard Storage Company, covering the period from November 1, 1928, until December 31, 1938.

"1. General Ledger.
2. Journal Record.
3. Private Ledger.
4. Accounts receivable Ledger.
5. Accounts payable Ledger.
6. Check Register.
7. Voucher Register and Vouchers.
8. Purchase Journals.
9. Sales Journals.
10. Investment Records.
11. Expense analysis Records.
12. Copies of Federal and State Tax Return.
13. Inventory Records.
14. Inventory Reports filed with the United States Government.
16. Contracts involving the sale of tobacco in force and effect November 5-15, 1935, and February 11, 1936.
17. Plant and Equipment Record.
18. Partner's Personal Account Books or Records.
19. Correspondence in connection with any summary item in the audit.

"This motion is based upon the record of this action, and the affidavit of Hugh A. White filed herewith" (R., Vol. 3, pp. 259-261).

This motion was supported by an affidavit of Hugh A. White, senior member of the firm of White, Bower and Prevo, a certified public accountant employed by Patricia R. O'Brien to review certain photostat copies purporting to be audits of Edward J. O'Brien and Company for the years 1931 to 1935, inclusive, and its subsidiaries. In the affidavit Mr. White set forth the necessities for obtaining these documents (R., Vol 3, pp. 261-272).

The Court, however, overruled this motion with the exception of tobacco inventories for 1935, including Government reports, capital, drawing and personal account of John A. O'Brien from 1925 to 1935, income tax returns for the years 1931 to 1935, inclusive, insurance premiums paid on any type of insurance by the firm from 1931 to 1935, and any appraisals for 1936, 1937, and 1938 (Record, Vol. 3, p. 273). An effort was made to see the "tobacco inventories for the year 1935 respecting the amount of tobacco." Mr. White was unable to obtain such information from either Edwin O'Brien, Jr., or Edward J. O'Brien and Company. "Likewise Edwin J. O'Brien, Jr., denied him access to the original or detailed records of the inventory which show in detail the type, group, quality, color, lengths and specifications of the tobacco inventory. All of this information was absolutely necessary to determine the market value of the inventory. Therefore, plaintiff filed a motion for an order directing defendants to comply with the Court's order of February 29, 1940, and to produce these documents (R., Vol. 3, p. 279). The Court overruled this motion (R., Vol. 3, p. 294), which left plaintiff without any means of ascertaining the market value of the tobacco inventory except as an accountant might estimate the same. At the same time, the Court denied another motion of plaintiff (R., Vol. 3, p. 284) for access to the property and depreciation reserve accounts, the maintenance and repair accounts and plans and specifications of building construc-

tion of Edward J. O'Brien & Company and its subsidiaries, sustaining said motion only insofar as access to the physical lands, buildings and fixtures was requested (R., Vol. 3, p. 295)."

To overcome this handicap as to the tobacco inventory plaintiff, on March 20, 1940, filed a third motion requesting access to the books and records of original entry of Edward J. O'Brien & Company and its four subsidiaries, such as show individual sales of tobacco, prices, quantities and gradings involved in each from May 1, 1935, until May 1, 1936, including all invoices for such sales (R., Vol. 3, pp. 299-305). This motion was not only denied, but the Court on its own motion revoked and expunged from its order of February 29, 1940, the language relating to the tobacco inventories for 1935 and the government reports relating thereto (R., Vol. 3, p. 297). Plaintiff was compelled to submit to a trial on the merits of this case without the benefit of a single book of original entry of Edward J. O'Brien & Company, or any of its subsidiaries. In this connection it must be remembered that Patricia O'Brien was the widow of a deceased partner and that the defendants' relationship to her was that of trustees to beneficiary. Further, Patricia O'Brien had never been given access to any original books prior to the purchase of her deceased husband's partnership interest by defendants.

Statement of Basis of Jurisdiction.

The jurisdiction of this Court is invoked and the writ of certiorari herein prayed for is permitted by and under Section 237 (b) of the Judicial Code as amended, Title 28, U. S. C. A., Section 344 (b), and especially that portion thereof which authorizes this Court by writ of certiorari to review final judgments of the highest court of a state

"where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution * * * of the United States."

In the State Court, the rights of the petitioner under the Fourteenth Amendment to the Constitution of the United States was especially set up in the petition for rehearing, on the extended opinion, before the Court of Appeals of Kentucky in the following language:

"Finally, we wish to add one other matter and upon this respectfully request that the Court specifically pass upon it and that is, the Federal question raised in the lower Court upon her motion and grounds for a new trial and upon her motion for a subpoena *duces tecum*, all of which motions were overruled in the lower Court and to which exceptions were reserved" (R., Vol. 4, pp. 411-418; R., Vol. 3, pp. 259-272).

"We respectfully ask the Court to notice that in the motion and grounds for a new trial in the lower Court, it was specifically pointed out, by way of objection, that the Court erred in admitting incompetent evidence offered by defendant in the Court below and rejecting competent evidence offered by the plaintiff, as well as overruling plaintiff's motion for a subpoena *duces tecum* and discovery filed both before and during the trial, and to which ruling the plaintiff excepted at the time all of which grounds are set out in the plaintiff's motion for a new trial in the Court below. It has been further pointed out that the conduct of the chancellor below was such as to amount to a denial of justice and to the equal protection under the laws of the plaintiff below, as exhibited in frequent contemptuous observations as to the plaintiff and her evidence.

"We call the Court's attention to the exceptions of the plaintiff in the Court below to the Court's conclusions of law, twenty-four in number, all of which were claimed

to be erroneous and seriously prejudicial to the rights of the plaintiff below, and all of which conclusions of law and fact resulted in depriving the plaintiff of her property without due process of law and all of which ruling and conclusions deny the plaintiff below and the appellant in this Court the equal protection of the laws, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States. Such rulings of the Court below, together with the rulings of this Court as disclosed in its last opinion, will result in a confiscation of the property of the plaintiff below and a deprivation of one-half of the value, or values, of property to which she was entitled. The appellant now asserts that this is a denial insofar as she is concerned, of the equal protection of the laws of the United States and a violation of the Fourteenth Amendment of the Constitution of the United States as set out above."

"With this fact being pointed out, we ask a re-examination of the grounds for a new trial filed in the lower Court, together with the exceptions made to the conclusions of law in the lower Court, as being in violation of the Fourteenth Amendment of the Constitution of the United States and that the Court, in its final opinion upon this petition for rehearing, shall say whether or not the above provisions of the Constitution of the United States have or have not been violated in these proceedings."

The Federal question thus raised was specifically passed upon by the Court of Appeals of Kentucky adversely to the petitioner (Opinion, pp. 32a and 32b).

Questions Presented.

This brings up the questions presented in this petition which we outline as follows:

1. That the denial by the lower court of the process of that Court by refusing in all material respects petitioner's motion for subpoena *duces tecum* resulting in denial to her of access to any single book of original entry of the partnership, or of its subsidiaries; or original document from which to ascertain or prove value, prevented her, in effect, from having her day in Court and amounted to the denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States. Georgia Railway & Electric Co. v. Decatur, 295 U. S. 165, 79 L. Ed. 1365, 55 S. Ct. 701; B. & O. R. R. Co. v. U. S., 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. F. R. 406; Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914.

2. That the error of the Jefferson Circuit Court in this suit by a widow, sole beneficiary of her husband's estate, to rescind an executed contract of sale of her deceased husband's interest in a partnership to surviving partners, to permit introduction in evidence of documents (a) insurance trust agreement depriving widow of husband's insurance, and (b) will taking everything except dower from widow, which documents were obtained from husband while kidnapped and held under armed guards at the home of one of the surviving partners deprived widow of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

3. The recognition by the Court of said documents obtained by force, as aforesaid, as a bargaining basis for

sale by the widow of her deceased husband's interest in the partnership deprived her of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

4. The decision of the State Court being contrary to the admitted and uncontradicted facts and the well-established principles of law amounted to arbitrary deprivation of petitioner's property without due process of law and without a real hearing as contemplated under the Fourteenth Amendment to the Constitution of the United States. Saunders v. Shaw, 244 U. S. 317, 64 L. Ed. 1163, 37 S. Ct. 638; Traus v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124; Washington *Ex Rel.* Oregon Railroad Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

5. Where the Court found facts substantially correct and recognized correct rule of law applicable thereto, but failed altogether without reason to apply such rule of law to such facts as a result thereof there was unjust enrichment of trustee of expense of *cestui que trust*, such action amounts not simply to error, but there is a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States.

Reasons Relied Upon for Allowance for Writ.

The Fourteenth Amendment of the Constitution of the United States, does not, of course, guarantee to any person that the Courts of the several states in the trial of litigation pending before them will decide all matters of fact or law correctly and free from error, nor is it contended that mere erroneous decisions by a State Court will give jurisdiction to this Court to review by writ of certiorari. On the other hand, although in a State Court notice and the opportunity for a hearing of some sort is provided, if the

conduct of a State Court is such that, in effect, while it goes through the form of a hearing, nevertheless, it amounts to no hearing at all, then due process has not been afforded as guaranteed by the Fourteenth Amendment.

Petitioner relies upon the fact that the conduct of the State Court as set out in the five questions presented, *supra*, had the effect of denying her a real or fair hearing as contemplated by the Fourteenth Amendment.

The denial by the trial Court of petitioner's motion for subpoena *duces tecum* in all material respects prevented the petitioner from proving one of the necessary elements of fraud and deceit. To show the true value of the interest of John A. O'Brien in Edward J. O'Brien & Company and thereby the falsity of respondents' representations was absolutely necessary in order for plaintiff to make out her case. If the Court afforded her its process and gave her a full hearing on all the other elements necessary in order to make out a case of fraud and deceit for the rescission of the contract of sale and yet denied her the process of the Court by subpoena *duces tecum*, or otherwise, and denied her an opportunity to be heard at all upon this one necessary element of her cause of action, then she has, in effect, had no hearing at all.

The petitioner, as the widow and sole beneficiary of her husband's estate, occupied the same position as her husband would have occupied if living with regard to the use as evidence against her of documents procured from her husband by force and while he was being illegally held a prisoner being deprived of his liberty without due process of law. Therefore, the error of the Court in permitting documents obtained from the husband under such circumstances and by force to be used as evidence against him or against a personal representative of his estate and stand-

ing in the same position as would have been occupied by the husband had he been living, constituted such error as to deprive the petitioner of due process of law.

These same documents which were obtained, as aforesaid, were recognized by the Court in its decision as a bargaining basis for the sale and as the consideration for the giving up by the widow of her husband's interest in the partnership for less than it was actually worth.

In this regard, the Opinion of the Court of Appeals relates (Opinion, p. 18):

> "These things (referring to these documents and other inconsequential claims) were factors to be considered when a full revelation of the business and its worth had been made. Their settlement was part of the consideration for the sale of the partnership interest. The difference between its value and the cash payment for it is represented by their surrender."

For the Court to permit documents which were obtained in such a manner thereafter to be used as consideration for the widow giving up her deceased husband's interest in the partnership for less than it was worth is relied upon as depriving her of her property without due process of law.

Uncontradicted facts in this record show that the representations made by the brothers O'Brien to Mrs. O'Brien as to the value of her deceased husband's interest in the partnership of Edward J. O'Brien & Company were fraudulent in that they were false and incomplete and that Mrs. O'Brien and her attorneys and advisors relied upon these representations in contracting for and selling the partnership interest to the brothers O'Brien. The well-established principles of law recognized by the Court, demanded of the brothers O'Brien in dealing with the widow of their deceased brother and partner whose estate still occupied the position of silent partner in the partnership,

the duty represented by the term *uberrima fides*. This duty was violated by them and recognized by the Court to have been so violated. In rendering its decision, however, the Court arbitrarily and without reason failed to apply the law to the facts. This procedure amounted to the denial of any real hearing to the petitioner and deprived her of her property without due process of law. The foregoing are the reasons relied upon by the petitioner for the issuance of the writ of certiorari herein prayed for and it is respectfully submitted that any one of them is sufficient for this purpose. In her brief which is annexed to this petition, petitioner will seek to go more fully into each of these reasons, and petitioner respectfully submits that for the foregoing reasons a new trial in the State Court should be afforded to this petitioner.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of This Honorable Court directed to the Court of Appeals of Kentucky commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case of Patricia R. O'Brien against Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien, Marie O'Brien Michael, Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the Will of Elizabeth Graves O'Brien, Deceased; The Fidelity & Columbia Trust Co. and the Louisville Trust Company, Co-Administrators of the Will Annexed of John A. O'Brien, Deceased; and Edward J. O'Brien & Company, a Co-Partnership Composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien; and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the Will of Elizabeth Graves O'Brien Deceased, and that the judgment of the Court of Appeals of Kentucky and of Jefferson Circuit Court,

Chancery Branch, First Division, be reversed, and that an order be entered remanding said case to the said Court of Appeals of Kentucky and to the said Jefferson Circuit Court, Chancery Branch, First Division, for a new trial thereof and for such other and further relief in the premises as to this Honorable Court may seem meet and just.

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ALLEN PREWITT,
Frankfort, Ky.,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1943.

PATRICIA R. O'BRIEN,

Petitioner,

v.

EDWIN J. O'BRIEN, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

I. Factual Background.

The case below is 294 Ky. 793, 172 S. W. 2d 595.

Petitioner is the widow of John A. O'Brien and the sole beneficiary of his last will (Opinion, p. 1). She sued the respondents, who are his former partners and are his brothers, with the executors of his mother's will and his co-administrators, in the Jefferson Circuit Court of Kentucky to rescind her sale of his interest in the partnership of Edward J. O'Brien & Company. In substance, she averred fraud in the transaction—specific misrepresentations that its value was only $425,649.45, breach of fiducial duty to disclose and the concealment of facts showing its true worth of more than $642,761.43 (R., Vol. 1, pp. 93, *et seq.*). Further she averred an unlawful conspiracy on the part of the real defendants to possess themselves of her husband's interest (R., Vol. 1, p. 74).

The genesis of that charge is in "some apparently shameful occurrences," as we quote and now review findings of the Court of Appeals to show. The husband, John A. O'Brien, died of tuberculosis, whether with or without contributing illness, on January 1, 1934. He became ill in 1933. He quit going to the firm's offices in April, 1933, because, as he reported, of mistreatment by his brother, Edwin. During a half hour absence of his wife, on the afternoon of June 20, 1933, he disappeared from their home. Upon inquiry by his wife and her attorney, Leo T. Wolford, at the firm's office, his brother, Edwin O'Brien, refused to tell them anything. She located him at the home of another brother, Joseph, but then over a period of days was repeatedly denied admittance on the claim that he was too ill to see anyone. On these occasions, four khaki-clad, armed men guarded the hall and the outside. Further and continued efforts to see her husband or to talk with him by telephone failed. Finally, on August 3d, she found him in a dying condition at a hotel. The respondents shrugged off these occurrences with the claim of Joseph B. O'Brien that John had come and gone at his pleasure (Opinion, p. 5).

During that period of incarceration, he signed certain documents. "The execution of these papers is surrounded by mystery" (Opinion, p. 6). His wife had been the sole beneficiary of $200,000 of insurance policies on his life. A purported insurance trust signed July 7, 1933, omitted her and named (1st) any "improbable," surviving child or children and (2d) his "blood relatives" in the firm of Edward J. O'Brien & Company. Contrary to its recitals, no policies were ever deposited under this trust. On the same day, he signed a will. It gave his wife substantially only what she would be entitled to under the law upon a renunciation of any will and gave the residue of his property as in the trust agreement (Opinion, p. 6).

Several weeks later, he "set about diligently to undo what had been done and to revoke the trust." The Court of Appeals found that he then executed forms irrevocably designating his wife as sole beneficiary, but "overlooked" one policy for $50,000 in which she had been given a life interest (Opinion, pp. 7-8). By a will dated September 22, 1933, apparently executed in October, he made the single bequest:

> "I give to my wife, Patricia R. O'Brien, all of the household furniture and all of the personal property of my estate" (Opinion, p. 8). (He had no real estate outside the partnership, the latter being considered by the Court as personalty, in a going concern.)

Following his death, representatives of the brothers laid claim to the insurance, under the trust agreement, and thereby succeeded in holding up payment of $150,000 to the widow. They suggested, if not threatened, various contests. They threatened suit on the insurance trust agreement. They threatened to have the last will construed to give petitioner only personal effects such as apparel (Tr., Vol. 2, p. 226, q. 224; Vol. 6, p. 671, q. 68). They threatened to incorporate the company and "freeze out" her interest so that it would not be worth $100,000 (Tr., Vol. 2, p. 218, q. 216; Tr., Vol. 20, p. 1881); Mrs. O'Brien is corroborated in this testimony by Mr. L. R. Curtis (Tr., Vol. 7, pp. 796, 804, 812, 813); E. C. Wirotzious, (Tr., Vol. 6, pp. 621, 622, 646); F. A. Shonkwiler (Tr., Vol. 7, p. 723); Mrs. L. S. Blickenstaff (Tr., Vol. 6, pp. 671, 679, 680, 689, 694); H. R. Douglas (Tr., Vol. 6, p. 584). They declined to consider letting her have the insurance unless she would agree to a sale of the partnership interest. Mrs. O'Brien was insisting that she did not want to dispose of that interest and that the insurance matter should be handled separately.

"And we have approached the consideration of the pivotal question," said the Court of Appeals, "in respect to the transaction involved in the litigation, namely the accomplishment of the contract sought to be rescinded, believing that the partners started out to acquire their deceased brother's interest in the partnership, with little scruple, as to the method or means to be employed" (Opinion, p. 10).

Under the doctrine of *uberrima fides* as applied to the purchase of a partnership interest, the Court of Appeals declared that the purchasing partners owed Mrs. O'Brien an "active duty" to "deal fairly with her" and to "voluntarily disclose full and accurate information concerning the business, its affairs and values." The ultimate of the Court's legal conclusion was:

> "If she relied upon them having done so and they had not, she is entitled to a rescission or other equitable relief, if designedly, on the ground of fraud; if innocently, on the ground of mistake. Obviously if there was actual misrepresentation, the result is the same."

As the basis of negotiation, and, in June, 1935, O'Brien's attorney gave the widow and her counselors a memorandum known in the record as plaintiff's Exhibit 22. They also gave her attorney a copy of an audit for the fiscal year ending November 30, 1934 (plaintiff's Exhibit 26). In addition, the O'Brien brothers allowed her and her counselors for a "brief while" to see audits back to 1928. "It seems," as the Court of Appeals found, "the earlier audits were in possession of Mrs. O'Brien's counselors only a short while" (Opinion, p. 24). It is undisputed that this "short while" was the period from 10 A. M. until 3 P. M. on June 27, 1935. The O'Briens insisted on their return at that time (Tr., Vol. 20, pp. 1817, 1871).

Exhibit 22 and the 1934 audit showed the value of decedent, John A. O'Brien's interest as $425,649.45, the representation claimed in the petition. "We have," said the Court, "The peculiar situation here of innocence by the challenger of the conditions of the business who, however, had no confidence in the representations of those with whom she was dealing and who had competent and trustworthy counselors" (Opinion, p. 32).

Yet, from the necessity of the case, the Court found in effect that she and her counselors did rely and had to rely on those representations, as all the information they had.

For it found that "On Mr. Humphrey's (Mrs. O'Brien's attorney) request, Edwin J. O'Brien, Jr., made an affidavit, that all the assets of the partnership were described in the audit reports and that the partnership had no assets not reflected therein" (Opinion, p. 15). Thus they sought personal assurance of the fact and of the fullness of the information. Further, the Court found that the "negotiations were predicated upon the book values" (Opinion, p. 22), and that "all parties seem to have been content to settle upon the basis of book value" (Opinion, p. 23). As the "predicated" facts and as the "basis" of negotiations for the purpose of the Court's rulings, and in view of the lack of other information and the assurance sought and given, she and her counselors did rely on it. In no other way can the somewhat apparent contradictions of the opinion be sensibly understood.

But, this figure of $425,649.45, taken from the "books" was in fact held out and accepted as the real or market value of John A. O'Brien's interest. Plaintiff's Exhibit 22 showed $425,649.45 as the "present" interest. Moreover, it depreciated the value of the subsidiaries 50% because of supposedly "depressed" conditions (Opinion, p. 22) especially of the English subsidiary (Opinion, p. 16).

In that light, Exhibit 22 as a representation was subject to no other fair construction on its face:

PLAINTIFF'S EXHIBIT No. 22.

Present Interest		$425,649.45
Real Estate	$331,873.95	
Pro Rate based on capital....	23.77%	78,886.44
		$346,763.01
Her ⅓ Life Interest Real Estate 23¼% of $78,886.44		18,341.10
		$365,104.11
Depreciate wholly owned subsidiaries 50% $252,500 at 50%—$126,250 at 23.77%....		30,009.62
		$335,094.49
Remainder Interest in $50,000 Life Ins..		17,500.00
		$317,594.49
½		$158,797.25

$425, 649.45 was expressly represented to plaintiff as the market value (Tr., Vol. 2, p. 212, q. 197, p. 213).

At least Edwin J. O'Brien, Jr., made affidavit that the underlying "audit * * * reflected * * * all the assets" (Opinion, p. 15). Certainly, it was the undisputed conviction of all her counselors at every point that the interest was really worth no more—Mr. Edward C. Wirotzious (Vol. 6, pp. 614, 615, 616), Mr. L. R. Curtis (Tr., Vol. 7, pp. 800, 801, 202), Mr. L. S. Blickenstaff (Tr., Vol. 7, pp. 834, 836), Mrs. L. S. Blickenstaff (Tr., Vol. 6, p. 671), Mr. F. A. Shonkwiler (Tr., Vol. 7, pp. 723, 727), J. G. McPherson (Tr., Vol. 17, pp. 1629-30), George D. Caldwell (Tr., Vol. 16, p. 1537), Edward P. Humphrey (Tr., Vol. 15, pp. 1415-16-56-57).

That is why and only why Mrs. O'Brien and her counselors "predicated" the negotiations on it and were "content to settle upon the basis" of it. "The fact," said the Court, "that the widow had capable counselors did not relieve the surviving partners of any of their duties and responsibilities. But their retention, knowledge and counsel concerns very materially the factor of her dependence and reliance upon the prospective purchasers' representations, made or omitted."

Recurring to the adjudged prior "innocence" of the widow "of the conditions of the business," it is the undisputed fact that her "counselors" and "advisers" had or received no more information of materiality than was available to her (Humphrey, Tr., Vol. 15, pp. 1421, 1456, 1457, q. 152; Vol. 3, p. 330, q. 451; McPherson, Vol. 17, pp. 1614, 1629-1630; Vol. 19, pp. 1769, 1774, 1775). There is no pretense that they had any more.

To place ourselves in position to show wherein petitioner was denied due process in her effort to try specific breaches of the active duty to disclose full and accurate information, it is necessary to enumerate the items of concealment and misrepresentation.

1. Represented value		$425,649.45
2. John A. O'Brien's 21.25% of additional values:		
Profit for 1935 of Edward J. O'Brien & Co.	$ 17,185.07	
Increase in value of securities	22,262.05	
Goodwill of Edward J. O'Brien & Co.	147,168.42	
Excess of appraised over book value		
(a) Property, Plant & Equipment		
1. Edward J. O'Brien & Co.	37,254.93	
2. Subsidiaries	8,890.51	
Estimate of Excess of Market over cost or book value		
(b) Tobacco Inventory		
1. Edward J. O'Brien & Co.	10,830.34	
2. Subsidiaries	6,688.18	
Interest due from Edwin O'Brien		
1. Capital deficiency	29,907.49	
2. Overdraft	6,570.21	
Improper charge of expense	5,083.69	
Excess value of Subsidiaries over book value	5,697.49	
	$297,558.39	$297,558.39
True Value—November, 1935		$723,207.84

That in the negotiations respondents flatly denied petitioner leave to make an independent audit at her own expense was testified by Mr. Wirotzious (Vol. 6, pp. 619-640, 642, 649, 653; Vol. 20, pp. 1823, 1824, 1825, 1826, 1827, 1828), Mr. Shonkwiler (Vol. 7, pp. 722, 724, 726, 727), Mr. Curtis (Vol. 7, pp. 800, 808), Mr. Douglas (Vol. 6, p. 584), Mr. L. S. Blickenstaff (Vol. 7, pp. 832, 834, 846, 847, 849), Mrs. Blickenstaff (Vol. 6, pp. 674, 675, 686, 685, 690, 694, 702, 703).

Respondents were as unwilling to make disclosure at the trial.

The denial to Patricia R. O'Brien by the trial court of all access to every book of original entry and primary fact, except the physical plants, is established by the orders in the record. Prior to the hearing before the trial court, and on February 23, 1940, she filed a motion for subpoena *duces tecum* (R., Vol. 3, p. 259), to reach the following books of Edward J. O'Brien & Company and its four subsidiaries for the period from November 1, 1928, to December 31, 1938, viz.: (1) general ledger, (2) journal record, (3) private ledger, (4) accounts receivable ledger, (5) accounts payable ledger, (6) check register, (7) voucher register and vouchers, (8) purchase journals, (9) sales journals, (10) investments records, (11) expense analysis records, (12) copies of Federal and State Tax Returns, (13) inventory records, (14) inventory reports filed with the United States Government, (15) contracts involving the sale of tobacco in force and effect November 5-15, 1935, and February 11, 1936, (16) plant and equipment record, (17) partners' personal account books or records, (18) correspondence in connection with any summary item in the audit. The motion was supported by an affidavit of Hugh A. White, plaintiff's auditor (R., Vol. 3, p. 261). The Court partially sustained (but only temporarily on the material points) plaintiff's motion by directing defendant, Edwin J. O'Brien, Jr., to produce or permit plaintiff, by counsel, auditor and necessary clerical assistants to examine (1) tobacco inventories for 1935, including report to the State or Federal Government or any of its agencies respecting the amount, grades and year of tobacco in the inventory, particularly Form TS-1 of the United States Department of Agriculture for 1931-1935, inclusive; (3) all copies of income tax returns of the partnership and all correspondence relative thereto for the

years 1931 to 1935, inclusive, with the Commissioner of Internal Revenue; (4) insurance premiums paid on any type of insurance by the firm and charged thereto for 1931 to 1935, inclusive; (5) any appraisals of Coats & Burchard and/or any other appraisals of similar character for 1936, 1937, 1938 (R., Vol. 3, p. 273).

On March 12, 1940, it was necessary for plaintiff to file a motion to require Edwin J. O'Brien, Jr., to comply with the Court's order with respect to tobacco inventories and to produce all records giving details of tobacco inventory as of November 30, 1935, such as type, group, quality, color and length (R., Vol. 3, p. 279). However, the Court overruled plaintiff's motion (R., Vol. 3, p. 294). The same day plaintiff moved the Court for an order permitting inspection of the property, plant and equipment of Edward J. O'Brien & Company, H. N. Martin Leaf Tobacco Co., and the Tobacco Rehandling Company, Ltd., Inc., and for access to the property and to depreciation reserve accounts, the maintenance and repair accounts and the plans and specifications of building construction of each of said company and subsidiaries (R., Vol. 3, p. 284). The motion was sustained insofar as access to land, buildings and fixtures was requested but the Court denied access to the detailed reserve accounts to the maintenance and repair accounts, and to the details of construction (R., Vol. 3, p. 295).

Plaintiff again moved the Court on March 20, 1940, to order defendants to produce such of the records of the partnership and its four subsidiaries showing individual sales of tobacco and prices, quantities and gradings involved in each from May 1, 1935 to May 1, 1936 (R., Vol. 3, p. 299). The Court not only overruled plaintiff's motion, but also upon its own motion expunged from its order of February 29, 1940 the language requiring the production of tobacco inventories for 1935 and government re-

ports (R., Vol. 3, p. 297). The record reveals that no books of original entry of Edward J. O'Brien & Co. or any of its subsidiaries were either voluntarily or under orders of the Court ever submitted to Patricia O'Brien or the co-administrators or to her attorneys, or to Hugh A. White, her auditor, or to any other auditor of Patricia O'Brien (Tr., Vol. 9, p. 920, q. 28).

(1) It is undisputed that the representation of defendants O'Brien on Plaintiff's Exhibit 22, viz.: "Present Interest—$425,649.45," did not include John A. O'Brien's share of the goodwill of Edward J. O'Brien & Co. Nor was there any amount whatsoever for the goodwill of this business included or considered in the negotiations which culminated in the sale of John's interest on November 5-15, 1935.

This, however, in no way altered the fact that Edward J. O'Brien & Company had goodwill which constituted one of its most valuable assets. A goodwill value arises when a business is established and has demonstrated ability over a period of years to earn a profit in excess of a normal interest return upon the invested capital. Here was a business that dated back to 1880, and had been a consistent, dependable money-maker for more than half a century, including all the years of the depression. In November, 1935, Edward J. O'Brien & Company had for many years been the largest independent redrying and rehandling tobacco brokers and dealers in the world (Opinion, p. 2); they had vast holdings, including redrying and rehandling plants in several states (Tr., Vol. 12, p. 1111, q. 238), and their unbroken record of contracts with tobacco growers and buyers, as well as manufacturers, had won a large clientele, which included even foreign governments, such as the Government of France, and an important English contract. Likewise, The American domestic business was, year in and year out, producing a substantial profit.

The business was so deep-rooted and substantial that even when Edward O'Brien, Sr., died in 1928, the business continued on just as before, with large profits each and every year thereafter (Tr., Vol. 10, p. 983, q. 26).

Obviously, suppressed, subsisting contracts of the firm for the sale of tobacco would have been one if not the most vital and tangible elements of its good will. On the trial petitioner was relegated in its estimation to a capitalization of the net earning from the tobacco business in excess of six per cent, as shown only by the audits respondents chose to furnish—to their evidence. After doubtful musings whether value so found actually existed, the Court of Appeals concluded that petitioner and her representatives could have "as easily calculated" it as the respondents. "The Court of Appeals mistakes the record in saying the capitalized goodwill value of the firm was $147,169.42 (Opinion, p. 21). That was John's 21.25% interest in it, the firm's total being $692,557.25 (Tr., Vol. 9, pp. 967-971 and Plaintiff's Exhibit 57).

This is in the face of the finding that, save for th November, 1934 audit, they had the audits for only a "brief while" (5 hours) in the negotiations. It is undisputed that audits for at least 6 and preferably 10 years are needed to compute goodwill even by the method of capitalization (Tr., Vol. 10, p. 1004). It is undisputed that even an experienced auditor with assistants requires at least 30 days to make such analyses of respondents' audits furnished petitioner and with which she had to be content at the trial (Tr., Vol. 9, pp. 919 and 920). That it would have been physically impossible to make such "calculations" in such few hours (Tr., Vol. 20, p. 1889). The trial Judge himself so found and shut off inquiry on the subject (Tr., Vol. 20, pp. 1890, 1891, 1892).

Thus, the trial Judge would not allow tangible proof and the appellate court foreclosed her for lack of it.

In this respect, not only in the negotiations but in the trial in the Circuit Court and in the final result there was an arbitrary and a substantial denial of the right to be heard.

(2) There is conflict in the evidence whether petitioner was presented an appraisal of *March 31, 1934*, showing the "net sound value" of real property, plant, and equipment as $506,301.95 (Opinion, p. 24). This value was represented to her in Exhibit 22 and in the balance sheet given her as $331,873.95. But, it is undisputed fact that she was not furnished or told of an available appraisal as of the previous March 1, 1935, showing this same value as $541,259.18 (R., Vol. 2, p. 254-C; p. 254-D; Ex. 60).

(3) Because the petitioner was also cut off from the actual means of proving the actual market value of the tobacco inventories—what kind and amount of tobacco they had, it is impossible to say what the increased value is that should be added to the book value to arrive at a true value for the purpose of the sale of the partnership interest (Tr., Vol. 9, p. 960, q. 89). Thus the Court of Appeals was enabled to brush aside (Opinion, p. 25) an estimate of the excess market value of $17,538.52 of the John A. O'Brien's interest based upon only 6.9% of profit on total inventory cost of $973,923.71 (Exs. 57-61-62-63-64).

(4) It is mistakenly stated in the opinion that a partial "audit" of the accounts of the company was made for petitioner pending the trial of the case (Opinion, p. 25). It is undisputed fact that the only "audit" made by any representative for the petitioner was a mere analysis of the respondent's audits and of the other partial and secondary information that respondents and the trial Court would concede to her (Tr., Vol. 9, p. 920; Ex. 57). Petitioner's auditor, Hugh A. White, was never permitted to see any books, save as above noted (Tr., Vol. 20, p. 1882).

In effect, the Court of Appeals concludes that petitioner failed to meet the burden of proof (Opinion, p. 32). She was cut off by the trial judge, without redress from the appellate court.

Under fundamental principles of justice, "rooted in the traditions and conscience of our people," certainly she showed enough to be entitled to the primary facts, to the examination of vital and of original records by her own witnesses—if not in the negotiations, then in the trial. Both the *uberrima fides* demanded by the situation and judicial fair play entitled her to that. The reasons of the trial Circuit Court for denying her an opportunity for that type of hearing were illusory and flatly contradictory; because "goodwill" as capitalized from income shown on respondents' audits was "enough," more from contract and the like would be an "over-refinement"; also it included market values of inventories. But, the Court of Appeals held it was not enough and did not include them. Anyway, the trial judge would "personally prefer" respondents' audits (R., Vol 3, pp. 307, 308). Besides, *uberrima fides* would be "inconvenient" to respondents (p. 307)! Inconvenience was not a defense to producing facts demanded by the situation (*cf.*, Petroleum Exploration v. Public Service Com,, 304 U. S. 209, 58 S. Ct. 834, 82 L. Ed. 1294). The trial Circuit Judge himself illustrated the necessity for the basic figures—the customary book method of valuing large assets at nominal values, yet persisted to the last in his denial of any discovery of the original books of entry or original sources of the evidence. Withal, a quality of flippancy and overdrawn levity tantamount to caprice stamps the Circuit Court's trial of the case, discernible in reading only the final opinion (R., Vol. 3, pp. 340, *et seq.*), and the narrative of the efforts to obtain disclosure. Transcript of Proceedings on motion for Subpoena *Duces Tecum*, Vols. 1, 2 and 3, Transcript of Testimony of • • •

March 12, 1940, and of March 20, 1940. (In volumes on transcript of proceedings in advance of trial on subpoena *duces tecum*.)

Argument.

(1) To constitute a hearing which satisfies due process, it must be a real one and not a sham or pretense. Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406. To satisfy due process, a hearing must be a fair one (Railroad Com. of California v. Pacific Gas & Electric Co., 320 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319), according the litigant an actual opportunity to present evidence in support of his contentions. Georgia Railway & Electric Co. v. Decatur, 295 U. S. 165, 55 S. Ct. 701, 79 L. Ed. 1365; B. & O. R. R. Co. v. U. S., 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

To condemn without a hearing or to depart from established modes of procedure offends due process. Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914.

A State may deprive a person of due process through its judicial function as effectively as through its legislative. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107.

It cannot be contended that the statutory law of Kentucky is deficient. Section 528 of Carroll's Kentucky Code of Civil Practice reads:

> "The process by which the attendance of a witness is required is a subpoena. It is a writ directed to the sheriff, requiring him to summon the person named therein to attend at a particular time and place, to testify as a witness. It may, when the court or the judge thereof so directs, require the witness to bring with him any book, writing or other thing under his control, which he is bound by law to produce in evidence."

To drown in a mass of whimsical colloquy and circumlocution a litigant's substantial right to evidence demanded by the subject and necessities of the case transcends judicial discretion and results in but a pretense of a hearing. It relegated petitioner to inferences from the previous inferences of her adversaries' witnesses, however reputable. A party is entitled to his own reputable expert witnesses and their honest inferences.

The ruling of the Court of Appeals on the Trial Judge's denial to petitioner of the original sources of the evidence is noteworthy. If error, said the Court, it did not offend due process because due process does not assure a litigant against judicial errors in the exclusion of evidence. (Citing opinions of this Court, Opinion, p. 32A). If there were mere errors, of which the Court did not expressly say, it had the undoubted power to correct them, without regard to due process. Why anticipate the opinion of this Court? But, it was not mere error. The denial went to the heart of petitioner's right and opportunity to be heard under the circumstances.

Finally, the Court declared it had tried the case *de novo* and that petitioner was not claiming that it had denied petitioner a complete hearing or a fair trial. But, the appellate court heard no new evidence. It never does on appeals. It is bound by the record brought to it. Edwards-Barnard Co. v. Pflang, 115 Ky. 393, at p. 403, 73 S. W. 1018; Carroll's Kentucky Civil Code of Practice, Sec. 737. Of course, the Court had reference only to the general rule, that appellate courts try equity cases anew on the same evidence.

2. Therein by indirection, the Court sustained a denial of the due process guaranteed by the Fourteenth Amendment to the Federal Constitution. Not only therein, but in arbitrarily and capriciously deciding the case contrary to well settled and admitted principles of law and the in-

disputable concealment of large values, the court below denied petitioner due process Saunders v. Shaw, 224 U. S. 317, 37 S. Ct. 638, 64 L. Ed. 1163; Truax v. Corrigan, 257 U. S. 312, 425 S. Ct. 124, 66 L. Ed. 254; Washington, *ex rel.* Oregon R. R. Co. v Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

Conclusion.

We respectfully submit that the writ of certiorari should be granted and the judgment and opinion below reversed.

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Lexington, Ky.,
Counsel for Petitioner.

November 22, 1943.

ALLEN PREWITT,
Frankfort, Ky.,
Of Counsel.

(2)

Office - Supreme Court, U. S.
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No. 499

IN THE

Supreme Court of the United States

October Term, 1943.

PATRICIA R. O'BRIEN, - - - - - - Petitioner,

versus

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL, Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the Will of ELIZABETH GRAVES O'BRIEN, Deceased; THE FIDELITY & COLUMBIA TRUST CO. and THE LOUISVILLE TRUST COMPANY, Co-Administrators of the Will Annexed of John A. O'Brien, Deceased; and EDWARD J. O'BRIEN & CO., a Co-Partnership Composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien; and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the Will of Elizabeth Graves O'Brien, Deceased, - - - - - - - - - - Respondents.

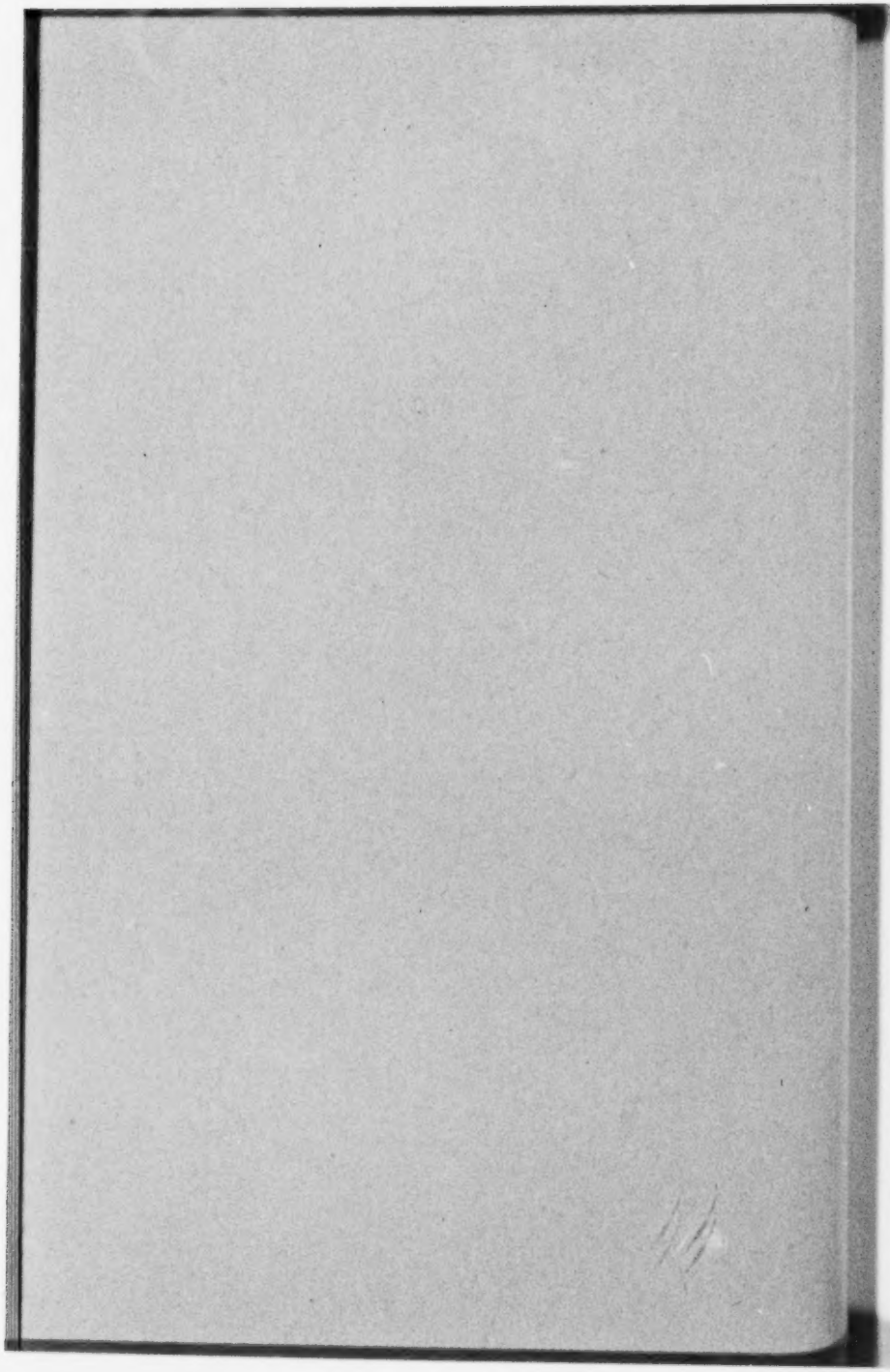
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOUIS SEELBACH,
WILLIAM W. CRAWFORD,
Counsel for Respondents.

CRAWFORD, MIDDLETON, MILNER & SEELBACH,
Of Counsel.

Louisville, Ky.,
January 4, 1944.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



SUBJECT INDEX.

	PAGE
Summary Statement of Facts	2
Opinion of Court of Appeals	6
Contentions of Petitioner	7
Argument for Respondents	8
(1) Alleged Denial of Petitioner's Motion for Subpoena Duces Tecum	12
(2) Alleged Error in the Introduction of Evidence	23
(3) General Claims That the Decision of the Kentucky Court of Appeals Was Erroneous	24
Conclusion	26

AUTHORITIES CITED.

	PAGE
Kentucky Civil Code of Practice, Section 528	14
American Railway Express v. Kentucky, 273 U. S. 269	9
Castillo v. McConnico, 168 U. S. 674	9
Corry v. Campbell, 154 U. S. 629	8
Drivers Union v. Meadowmoor Co., 312 U. S. 287	11
Magnum Import Company v. Coty, 262 U. S. 159	26

IN THE

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No. 499.

PATRICIA R. O'BRIEN, - - - - - *Petitioner,*

v.

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL, EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN AND RICHARD J. WHELAN, EXECUTORS UNDER THE WILL OF ELIZABETH GRAVES O'BRIEN, DECEASED; THE FIDELITY & COLUMBIA TRUST CO. AND THE LOUISVILLE TRUST COMPANY, CO-ADMINISTRATORS OF THE WILL ANNEXED OF JOHN A. O'BRIEN, DECEASED; AND EDWARD J. O'BRIEN & CO., A CO-PARTNERSHIP COMPOSED OF EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN AND EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN AND RICHARD J. WHELAN, EXECUTORS UNDER THE WILL OF ELIZABETH GRAVES O'BRIEN, DECEASED, - *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondents respectfully submit that the prayer of the Petitioner for the issuance of a writ of certiorari should not be granted.

SUMMARY STATEMENT OF FACTS.

John A. O'Brien, husband of the Petitioner, died on January 1, 1934. At the time of his death he was a partner in the firm of E. J. O'Brien & Co., dealers and brokers in loose-leaf tobacco. The other partners at the time of his death were Edwin J. O'Brien, Jr., Joseph B. O'Brien, James G. O'Brien and Elizabeth Graves O'Brien. The capital investments of the partners varied greatly in accordance with partnership withdrawals and the capital bore no relation whatever to the distribution of partnership earnings, which were according to definite percentages fixed in the Articles of Co-partnership.

After the death of John A. O'Brien, two documents, dated July 7, 1933, and September 22, 1933, respectively, were probated in the Jefferson County Court as his last will and codicil. At the same time the Louisville Trust Company and the Fidelity & Columbia Trust Company, both of Louisville, Kentucky, were appointed co-administrators with the will annexed. The will of July 7, 1933, gave to Petitioner only her dower interest in the estate of John A. O'Brien. The codicil of September 22, 1933, gave to Petitioner his entire personal estate. After John A. O'Brien's death, there also came to light an Insurance Trust Agreement executed by him on July 7, 1933.

The size of the estate to which the Petitioner was entitled depended upon the validity or non-validity of the three documents in question, namely, the will, the codicil, and the Insurance Trust Agreement, and

also upon the value of John A. O'Brien's interest in the partnership of E. J. O'Brien & Co.

The Petitioner retained the services of counsel of outstanding ability and was constantly advised by able representatives of the two trust companies, which had been appointed administrators of the estate. She also retained the services of a well-known firm of accountants.

The death of John A. O'Brien did not dissolve the partnership of E. J. O'Brien & Co., because such a contingency had been specifically taken care of in Article 5 of the Articles of Co-partnership. Under the terms of Article 6 (Transcript of Proceedings, Vol. II, p. 252), it was in substance provided that, in the event of the death of any partner, his interest should remain in the partnership for five years thereafter. It was further stated that:

> "In the event the estate elects to withraw from the partnership at the expiration of five years, then the interest of said decedent shall be the value of the interest, as shown by the books of the company, or by appraisement, plus profits and interest, if any."

About two years after the death of John A. O'Brien, and pursuant to the insistence of Petitioner, and with the approval and consent of her counsel and the administrators, a settlement agreement was entered into under the terms of which the Petitioner received all of the insurance money, which was in controversy (amounting to $201,000), all of the personal estate of

John A. O'Brien outside of the partnership (which amounted to over $60,000), a renunciation of any right to contest the will of John A. O'Brien, and $380,000 in cash for the interest of John A. O'Brien in the partnership of E. J. O'Brien & Co. This agreement was executed by the Petitioner on November 5th and by the Respondents on November 15, 1935.

More than a year later the Petitioner brought this action in the Circuit Court of Jefferson County, Kentucky, to set aside that settlement, claiming fraud through misrepresentation of facts, active concealment of facts, and failure to disclose facts. Inasmuch as the Petitioner received *all* of the insurance existing on the life of John A. O'Brien and *all* of his personal property outside of the partnership, no claim could be made that any facts in connection with such insurance or assets outside of the partnership were misrepresented or concealed or undisclosed. The Petitioner's claim devolved solely into the contention that the value of her husband's interest in the partnership was misrepresented and concealed and undisclosed by the Respondents.

The case was heard orally before the Chancellor of the Jefferson Circuit Court and, after the conclusion of the trial, lasting about four weeks, the Chancellor made his Findings of Fact and Conclusions of Law, which may be found in Transcript of Record, Volume III, beginning at page 340. The judgment of the Jefferson Circuit Court made said "Findings of Fact and Conclusions of Law" a part of the record and ordered that the petition of the plaintiff be dismissed. This

judgment may be found in the Transcript of Record, Volume III, p. 410.

The Petitioner appealed the case to the Court of Appeals of Kentucky. Briefs were filed by both sides, the case was orally argued, and on June 19, 1942, the Court of Appeals of Kentucky affirmed the Judgment of the Jefferson Circuit Court. As to the major portions of the controversy, the affirmance was by a unanimous Court. As to several items, the Court of Appeals of Kentucky divided and the affirmance as to these items was by a divided Court.

The Petitioner filed a Petition for Rehearing in the Court of Appeals of Kentucky and the case was again fully briefed and orally argued, with the result that on March 26, 1943, the Court of Appeals of Kentucky unanimously affirmed the Judgment of the Jefferson Circuit Court dismissing the petition, and modified and extended its former Opinion, dated June 19, 1942.

The Petitioner then filed a Second Petition for Rehearing in the Court of Appeals of Kentucky and in this Second Petition for Rehearing, for the first time, claimed in the very last portion thereof that she had been deprived of her property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Such claim had never been previously raised in the pleadings, on the trial, or in the briefs for Petitioner on appeal, or in the First Petition for Rehearing.

On June 25, 1943, the Court of Appeals of Kentucky overruled Petitioner's Second Petition for Rehearing and further extended its Opinion of June 19,

1942. The full Opinion of the Court of Appeals, as finally issued on June 25, 1943, is reported in 294 Ky. 793, 172 S. W. (2d) 595.

In regard to the alleged Federal question, the Court of Appeals of Kentucky had this to say (294 Ky. at p. 820):

> "On a second petition for rehearing the appellant argues for the first time that she was deprived of due process and equal protection under the law, vouchsafed to all citizens by the Fourteenth Amendment to the Federal Constitution. The same rights are protected by the Bill of Rights of the Constitution of Kentucky. Sections 3 and 14. The claim is rested upon: (1) The ruling of the trial court rejecting as incompetent certain evidence offered by the plaintiff and admitting certain evidence against her as competent; (2) denying her motion for a subpoena *duces tecum* for certain records of the defendants; and (3) the chancellor's 'frequent contemptuous observations as to the plaintiff and her evidence.'
>
> "If the rulings of the court should be regarded as erroneous, such action does not in our opinion offend constitutional rights. Due process of law does not assure a litigant against a wrong interpretation of the law, especially procedural, or against a judicial error in respect to the admission or exclusion of evidence. Arrowsmith v. Harmoning, 118 U. S. 194, 6 S. Ct. 1023, 30 L. Ed. 243; *Ex parte* Converse, 137 U. S. 624, 11 S. Ct. 191, 34 L. Ed. 796; Jones v. Buffalo Creek Coal & Coke Co., 245 U. S. 328, 38 S. Ct. 121, 62 L. Ed. 325; *In re* Pusey's Estate, 321 Pa. 248, 184 A. 844, certiorari denied Lavely v. Y. M. C. A., 299 U. S.

572, 57 S. Ct. 36, 81 L. Ed. 422; Stephenson v. Kirtley, 269 U. S. 163, 46 S. Ct. 50, 70 L. Ed. 213.

"This was a long trial, vigorously fought and presenting many complex questions of law and fact. From time to time during her examination the court tried to restrain the garrulity of the plaintiff when testifying. Sometimes the Judge showed impatience. Perfect patience is a virtue seldom possessed, even by a judge. The manifestation of this inherent human quality, however, does not violate any constitutional right of a litigant; especially if there is no jury whose views might be affected by it. The fact that a court severely criticizes the testimony of a witness whom he disbelieved will not support charges that he prejudged the case or showed bias, prejudice or capricious disbelief of evidence in his disposition of the case, nor nullify or otherwise affect his findings on evidence which he believed credible. *In re* Pusey's Estate, *supra*. *Moreover, this court has tried the case de novo and it is not claimed that we have denied the appellant a complete hearing or a fair trial.*

"We are of opinion that the judgment should be affirmed, and it is so ordered.

"Whole Court sitting."

CONTENTIONS OF THE PETITIONER.

The Petitioner claims that she was denied due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that

(1) the lower court overruled petitioner's motion for a subpoena *duces tecum* in all material

respects and denied to her access to any single book of original entry of E. J. O'Brien & Co., or of its subsidiaries;

(2) the Jefferson Circuit Court erred in permitting the introduction in evidence of the Insurance Trust Agreement, dated July 7, 1933, and the will of John A. O'Brien, dated July 7, 1933;

(3) the Kentucky Court erred in recognizing the said Insurance Trust Agreement and Will as a bargaining basis in the sale of the interest of John A. O'Brien's estate to one of the surviving partners;

(4) the decision of the State Court is contrary to the facts and well-established principles of law; and

(5) the Kentucky Court erred in not applying the correct rule of law to the facts found.

ARGUMENT FOR RESPONDENTS.

Respondents submit that there is no Federal question involved in the instant case and that the Supreme Court of the United States is without jurisdiction to grant a Writ of Certiorari.

This Court said in *Corry* v. *Campbell,* 154 U. S. 629:

* * * "We have no power to correct the errors of state courts in respect to the details of assessments made by municipal corporations upon

private property to defray the expenses of street improvements. Upon all such questions the action of the state court is final. There can be no doubt but that our jurisdiction is at an end if we find that sufficient provision has been made by law for contesting such a charge, when imposed, by an appropriate adversary proceeding in the ordinary courts of justice."

In *American Railway Express* v. *Kentucky,* 273 U. S. 269, at page 273, this Court said:

* * * "The action of the court followed a fair hearing, and there is no pretense that the challenged views were adopted in order to evade a constitutional issue. We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' Pennoyer v. Neff, 95 U. S. 714, 733; Booth v. Illinois, 184 U. S. 425, 429; Truax v. Corrigan, 257 U. S. 312, 329."

We quote the following from the opinion of this Court in *Castillo* v. *McConnico,* 168 U. S. 674, at page 683:

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The

first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the State, and as it is solely the result of such authority, may vary or change as the legislative will of the State sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several States. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court. Pittsburg, Cincinnati &c. Railway v. Backus, 154 U. S. 421; Kentucky Railroad Tax cases, 115 U. S. 321; Davidson v. New Orleans, 96 U. S. 97."

The facts in this case can not now be in dispute. The facts were found by the Chancellor of the Jefferson Circuit Court and affirmed by the decision of the Court of Appeals of Kentucky. Both Courts found that the Respondents did not make any misrepresentation of facts, did not conceal any facts, and did not fail to disclose the facts. Such findings by the Chancellor

and the Court of Appeals of Kentucky, based on substantial testimony, will not be disturbed by the Supreme Court.

In *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, at page 294 this Court said:

> "In this case the master found 'intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence,' and the Supreme Court justified its decision because picketing, 'in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that noncompliance would possibly be followed by acts of an unlawful character.' It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked."

We have hereinabove set forth in numerical order the contentions of Petitioner in that she was denied due process of law by the Kentucky Courts. For convenience, we will discuss these various contentions in the order named:

(1) ALLEGED DENIAL OF PETITIONER'S MOTION FOR SUBPOENA DUCES TECUM.

The petition filed in the Jefferson Circuit Court claimed that the Petitioner was induced to enter into the contract of settlement through misrepresentation of facts, concealment of facts, and failure to disclose facts.

Long before the settlement agreement of November 5-15, 1935, was entered into between the Petitioner and Respondents, it is clear that Petitioner had been furnished the following information:

(a) annual audits of E. J. O'Brien & Co. made by Peat, Marwick, Mitchell & Co. from March 29, 1928, to and including November 30, 1934 (Opinion of the Court of Appeals of Kentucky, 294 Ky. p. 814);

(b) appraisal of plant, property and equipment of E. J. O'Brien & Co. brought down to March, 1935 (Opinion, 294 Ky. p. 813);

(c) annual audits of subsidiaries (Findings of Fact and Conclusions of Law, Transcript of Record, Volume III, p. 399);

(d) copy of Articles of Co-partnership (Transcript of Proceedings, Volume IV, p. 417).

The audits made by Peat, Marwick, Mitchell & Co. and which had been furnished to the Petitioner and which showed *book* values, were used as a basis of negotiations in the settlement agreement. Although

the Petitioner could have had an independent audit made prior to the settlement, she was advised against this by her attorneys because of the expense, and the standing of the auditing firm of Peat, Marwick, Mitchell & Co. (Findings of Fact and Conclusions of Law, Transcript of Record, Volume III, p. 365; Opinion of the Court of Appeals, 294 Ky. p. 809).

In the original petition filed in this action, Petitioner filed as her exhibits "C" and "D" the said Peat, Marwick, Mitchell & Co. audits of the partnership of E. J. O'Brien & Co. for the years 1933 and 1934 (Transcript of Record, Volume I, p. 9).

These audits showed on their face that the values therein contained were *book* values and specifically called attention to the fact that the plant, property and equipment were carried at cost less depreciation; that the tobacco inventory was carried generally on the basis of cost, and that subsidiaries were carried on the basis of cost. The audits further stated that appraisals of plant, property and equipment showed higher values, but that these values had not been set up on the books. We repeat that all of this information was in the hands of the Petitioner before she entered into the settlement agreement of November 5-15, 1935, as was shown by uncontradicted evidence on the trial of the case.

Subsequent to bringing this action, Petitioner on June 24, 1938, asked for a discovery through the production of books and records in the possession of the Respondents. The Petitioner asked to have such books

and records available in an ante-trial deposition in accordance with the provisions of Section 528 of the Civil Code of Practice of Kentucky. This section reads as follows:

> "SUBPOENA DEFINED; SUBPOENA DUCES TECUM; COURT MAY DIRECT ISSUAL OF. The process by which the attendance of a witness is required is a subpoena. It is a writ directed to the sheriff, requiring him to summon the person named therein to attend at a particular time and place, to testify as a witness. It may, *when the court or the judge thereof so directs,* require the witness to bring with him any book, writing or other thing, under his control, which he is bound by law to produce in evidence."

The Court of Appeals of Kentucky has construed Section 528 of the Civil Code of Practice in *Union Trust Co.* v. *Garnett,* 254 Ky. 573, 72 S. W. (2d) 27, as vesting discretionary power in the Chancellor with respect to the production of the documents called for. The language of Section 528 of the Civil Code of Practice of Kentucky itself shows that the power of the Court is a discretionary power and the Court of Appeals of Kentucky in this connection said (254 Ky. p. 577):

> "Not to discern that the language of section 528 vests in the court, or the judge, the right to exercise a sound discretion, when determining the propriety of ordering a subpoena *duces tecum,* is to be forgetful of its language."

The Kentucky procedure is not unique in giving discretion to the Chancellor to require the production of books, papers and records.

Under Rule 58 of the Federal Equity Rules, which were superseded by the New Federal Rules of Civil Procedure, the Court was vested with discretion as to matters of discovery.

Under Rule 34 of the New Federal Rules of Civil Procedure it is stated that

> "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control;"
> * * *

The foregoing language is not mandatory, but permissive, and places discretion in the Court.

When the Petitioner first applied for discovery on June 24, 1938, the Chancellor ordered the Respondents to produce (Transcript of Record, Volume II, page 182):

(a) all audits of E. J. O'Brien & Co. from the year 1931 to the year 1935, inclusive;

(b) the personal account book of John A. O'Brien with the partnership;

(c) appraisals of the real estate of E. J. O'Brien & Co. for the years 1933, 1934 and 1935;

(d) all audits of all subsidiaries of E. J. O'Brien & Co. for the years 1931 to 1935, inclusive;

(e) appraisals of all subsidiaries of E. J. O'Brien & Co. for the years 1932 to 1935, inclusive.

As to other books and records demanded by the Petitioner, the Chancellor overruled the motion *without prejudice* and filed an opinion in support of his ruling (Transcript of Record, Volume II, p. 185). In this opinion the Chancellor outlined the limits of discovery available to a litigant in the Kentucky Courts and made the following statement:

Transcript of Record, Volume II, p. 187.

"In the instant case the issues are sharply defined. The plaintiff, Mrs. O'Brien, says that she sold out what was her interest in her husband's holding in E. J. O'Brien & Company, for a value less than the actual value, and that she was induced to do so by fraud of the defendant. The discovery sought is purely in respect to the value of the plaintiff's husband's interest in E. J. O'Brien & Company at the time of his death."

Transcript of Record, Volume II, pp. 187-8.

"With the issues defined the court now rules according to the order entered this date. All discovery thereby denied is denied *without prejudice to subsequent application* therefor, should the evidence adduced seem to justify, or should actual testimony be filed by affidavit, deposition, or *viva*

voce showing the relevancy to the issue of the discovery sought and differentiate it from a 'fishing expedition' under the provisions above quoted."

Again, and before the trial of the action, Petitioner moved for a subpoena *duces tecum* and asked for the production of virtually every book, record and document in the possession of the Respondents. On February 29, 1940 (Transcript of Record, Volume III, p. 272) the Chancellor granted the motion as to the following:

(a) Tobacco inventories for 1935, including Federal Government Reports as to amount, grades and year of tobacco in the inventory, and Forms TS-1 of the United States Department of Agriculture for the years 1931 to 1935, inclusive.

(b) Capital drawing and personal accounts of John A. O'Brien for the years 1925 to 1935, inclusive.

(c) Partnership income tax returns and all correspondence with the Commissioner of Internal Revenue relative thereto for the years 1931 to 1935, inclusive.

(d) Insurance premiums paid on any type of insurance by the firm and charged thereto for the years 1931 to 1935, inclusive.

(e) All appraisals for the years 1936, 1937 and 1938.

The order applied not only to the firm of E. J. O'Brien & Co., but to the four subsidiaries, namely, Tobacco Re-handling Company, H. N. Martin Leaf Tobacco Company, Western Tobacco Company and Standard Storage Company.

As to other books and records requested in the motion for subpoena *duces tecum,* the Court overruled the motion *without prejudice* to the right of the plaintiff to renew the application for the same information, or further and additional information.

It will thus be seen that for discovery purposes the Chancellor gave Petitioner access to all the books and records of E. J. O'Brien & Co. and its subsidiaries, which he deemed essential to enable the Petitioner to show whether or not the settlement contract had been entered into through misrepresentation, concealment, or failure to disclose material facts.

The testimony of Petitioner's expert, Hugh A. White (Transcript of Proceedings, Volume XX, p. 930) shows that in the preparation of Petitioner's case for trial he had before him:

(a) all the audits of E. J. O'Brien & Co. and its subsidiaries for the years 1931 to 1935, inclusive;

(b) records of tobacco inventories for 1935, consisting of summary sheets of the quantities and values at the close of the fiscal year and copies of United States Forms TS-1 for the years 1931 to 1935, inclusive;

(c) capital drawing and personal accounts and Federal income tax returns and correspondence for John A. O'Brien and his estate for the years 1925 to 1935, inclusive;

(d) Federal income tax returns and the Revenue Agents' reports relating to E. J. O'Brien & Co. for the years 1931 to 1935, inclusive;

(e) Insurance expense accounts of the partnership for the years 1931 to 1935, inclusive;

(f) appraisals by an appraisal company of the partnership and its subsidiaries for the years 1931 to 1938, inclusive.

During the trial Robert Richardson, connected with Peat, Marwick, Mitchell & Co. and who made the audits, stated that the audits reflected all of the assets as disclosed by the books (Transcript of Proceedings, Volume XVIII, p. 1662); that the audits correctly reflected the information contained in the books (Transcript of Proceedings, Volume XVIII, p. 1711); that the audits used *book* values as disclosed by the books (Transcript of Proceedings, Volume XVIII, p. 1742); and that the books were kept generally on the basis of cost and that the audits explained how the assets were carried (Transcript of Proceedings, Volume XVIII, p. 1760).

At the conclusion of the testimony heard by the Chancellor, the Petitioner renewed her motion for a subpoena *duces tecum* for all the books and records of the partnership and its subsidiaries and the Court

overruled this motion. In connection therewith the Chancellor stated in his Findings of Fact and Conclusions of Law (Transcript of Record, Volume III, p. 390):

> "The theory of this court in delineating the bounds of discovery was this: Not only the case, but also the discovery itself was on trial. In other words, if there was any reason as the trial progressed to believe that the audits were incorrect, incomplete or in any way misleading, the court with the flexible equitable procedure at its disposal might be expected to enlarge the scope of the discovery to the utmost limits required by justice.
>
> "During the course of this long trial where I have not only heard but also forced myself to understand every word of the testimony, there has not been the slightest suggestion that the books of E. J. O'Brien & Company did not reflect every transaction of the business of E. J. O'Brien & Company exactly as it occurred. Understand me, I do not mean for a moment to say that there is no dispute as to the correctness of the interpretations by the auditor of the transactions recorded—the effect given the transactions—but the record of the transactions themselves has thoroughly demonstrated its completeness from first to last throughout this long inquiry."
>
> * * * "I hope I have made it plain; for the matter is important. All transactions are listed, the books are complete. Nothing was acquired without a record of its acquisition, nothing was received without an entry, nor parted with. The audits have stood this acid test."

The negotiations for settlement between Petitioner and Respondents, including the sale of John A. O'Brien's interest in the partnership, were all conducted on the basis of the *book values* of E. J. O'Brien & Co., as shown by annual audits, which had been made by Peat, Marwick, Mitchell & Co., an auditing firm with an international reputation. In this connection the Court of Appeals of Kentucky said:

294 Ky., p. 809.

* * * "All parties concede the reputableness of the auditing firm employed by the company, whose reports were delivered to the representatives of the estate and Mrs. O'Brien. It has not been shown they were wrong and we do not conceive it to have been the duty of the surviving partners to have had another audit made."

294 Ky., p. 812.

"The articles provided that the basis of sale of a deceased partner's interest at the expiration of five years should be 'the value of the interest as shown by the books of the company or by appraisement, plus profits and interest, if any.' This definite contract between all the partners as to the alternative bases of purchase and sale cannot be ignored. It would seem to distinguish the case from the cases wherein the basis of negotiations was not defined. In such instances the true value of the firm's assets ordinarily is the basis rather than the book value. 47 C. J. 1167. The negotiations, as we have said, were predicated upon the book values, excepting the contentions of depressed values because of factors largely outside the business. And this, by the way, was a matter of opinion based upon disclosed facts."

294 Ky., p. 813.

* * * "all parties seem to have been content to settle upon the basis of the book value, subject to the reconciliation of opinions concerning the same and to the give-and-take bargaining in relation to the outside proposition, for we do not find that the matter of valuation by appraisement was mentioned."

The foregoing references to the record and the opinion of the Court of Appeals of Kentucky conclusively show that discovery is afforded by the Kentucky procedure and that the extent thereof is vested in the sound discretion of the Chancellor. Ample discovery was given to Petitioner in the case at bar. It is clear from the Findings of Fact and Conclusions of Law of the Chancellor and the Opinion of the Court of Appeals of Kentucky that the contract of settlement, involving the purchase and sale of an interest in the partnership, was predicated entirely upon *book* values. These values were all correctly reflected in the audits for seven years prior to the sale, which had been furnished to Petitioner and her counsel.

Actual values are, after all, only matters of opinion and were not involved in this litigation, inasmuch as the parties elected to deal on the basis of *book* values, and no statements relative to actual values were ever put forth by the Respondents.

We submit that criticism of the manner in which the Chancellor exercised his discretion on discovery proceedings does not raise any Federal question and the Petitioner was not denied due process of law.

(2) ALLEGED ERROR IN THE INTRODUCTION OF EVIDENCE.

It is claimed by the Petitioner that the Kentucky courts erred in permitting the introduction in evidence of a document dated July 7, 1933, and probated as the will of John A. O'Brien, and also erred in permitting the introduction in evidence of another paper dated July 7, 1933, referred to in the proceedings as the "Insurance Trust Agreement." Petitioner contends that such rulings of the Kentucky courts denied her due process of law.

The Court of Appeals of Kentucky in its opinion in this action (294 Ky. p. 820) correctly stated that due process of law does not assure a litigant against a wrong interpretation of the law, especially procedural, or against a judicial error in respect to the admission or exclusion of evidence, and cited numerous authorities from this Court in support of such statement.

Furthermore, present counsel for the Petitioner have failed to observe that the two documents of July 7, 1933, were introduced in evidence by Petitioner herself. The will dated July 7, 1933, was introduced by Petitioner as her Exhibit "17" (Transcript of Proceedings, Volume II, p. 171) and the Insurance Trust Agreement, dated July 7, 1933, was introduced in evidence by the Petitioner as her Exhibit "13" (Transcript of Proceedings, Volume II, p. 152).

(3) GENERAL CLAIMS THAT THE DECISION OF THE KENTUCKY COURT OF APPEALS WAS ERRONEOUS.

Surely these claims of the Petitioner do not involve any Federal question. They are the claims listed as 3, 4 and 5 in her Petition for writ of certiorari at page 19 thereof under the heading "Questions Presented." In claim 3 the Petitioner charges that the will of July 7, 1933, and the Insurance Trust Agreement of July 7, 1933, were obtained by force and should not have been considered by the Kentucky courts as a bargaining basis for the contract of settlement. Petitioner ignores the Chancellor's Finding of Fact (Transcript of Record, Volume III, p. 351) that John A. O'Brien went to the Louisville Trust Company unaccompanied on July 7, 1933, presented the signed Insurance Trust Agreement to George Caldwell, Vice-president of the Louisville Trust Company, had Caldwell execute the same on behalf of the Trust Company and placed it in a safety deposit box. The Chancellor found that John A. O'Brien was fully competent to transact business on July 7, 1933, and that there was grave doubt as to his mental capacity during the latter part of 1933 and at the time when the so-called codicil of September 22, 1933, was executed by him.

The gravamen of Petitioner's complaint in Nos. 4 and 5 of her "Questions Presented" seems to be that, although the Kentucky Court correctly found the facts and correctly stated the law, it failed to apply the law to the facts found and that this constituted a denial of due process.

A reading of the opinion of the Court of Appeals shows the error of this contention. The Kentucky Court held that, as a matter of law, the Respondents were obligated to make full disclosure to Petitioner of facts within their knowledge bearing upon the business of the partnership of E. J. O'Brien & Co. and its subsidiaries.

The Kentucky Court further found, as a matter of fact, that the Respondents had not misrepresented anything to the Petitioner and had made full disclosure of all material facts within their knowledge. The Chancellor said (Findings of Fact and Conclusions of Law, Transcript of Record, Volume III, p. 371):

> "We already know how much information the defendants O'Briens had furnished Patricia—all they themselves had."

The Court of Appeals in its final opinion, after stating the law to the effect that the Respondents owed a full duty of disclosure to the Petitioner, took up the items of Petitioner's claim *seriatim* and found that all available information had been given to the Petitioner on each of these items before the parties entered into the contract of settlement dated November 5-15, 1935. The Court of Appeals concluded that (294 Ky. 820):

> "Taking into consideration all these factors, as well as the formidable ones mentioned in the beginning concerning the attitude of those with whom the plaintiff had dealt, we are of the opinion that there was a fair and reasonable settlement and contract of purchase and sale."

The answer to Petitioner's contention that the Court of Appeals failed to apply the law to the facts is two-fold. In the first place, such error, if it existed, would not constitute a Federal question, and in the second place the Court did not err, but correctly applied the law to the facts found by the Chancellor and reaffirmed by the Court of Appeals.

CONCLUSION.

This Court has held that a writ of certiorari will not be allowed simply to give a defeated party another hearing (*Magnum Import Company* v. *Coty*, 262 U. S. 159). The Petitioner had a full and complete hearing in the Circuit Court of Jefferson County, Kentucky, and in the Court of Appeals of Kentucky and due process of law was afforded to her. The facts were found against her and the Kentucky courts correctly applied the proper rules of law to the facts found and entered judgment in favor of Respondents. There is no Federal question involved, and we ask that the Petition for a writ of certiorari herein be denied.

Respectfully submitted,

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Louisville, Ky.,
January 4, 1944.

(3)

No. 499.

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943.

PATRICIA R. O'BRIEN, - - - Petitioner,

versus

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL, EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN and RICHARD J. WHELAN, Executors Under the WILL OF ELIZABETH GRAVES O'BRIEN, Deceased; THE FIDELITY & COLUMBIA TRUST CO. and the LOUISVILLE TRUST COMPANY, Co-Administrators of the Will Annexed of John A. O'Brien, Deceased; and EDWARD J. O'BRIEN & CO., a Co-partnership Composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien; and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the WILL OF ELIZABETH GRAVES O'BRIEN, Deceased, - Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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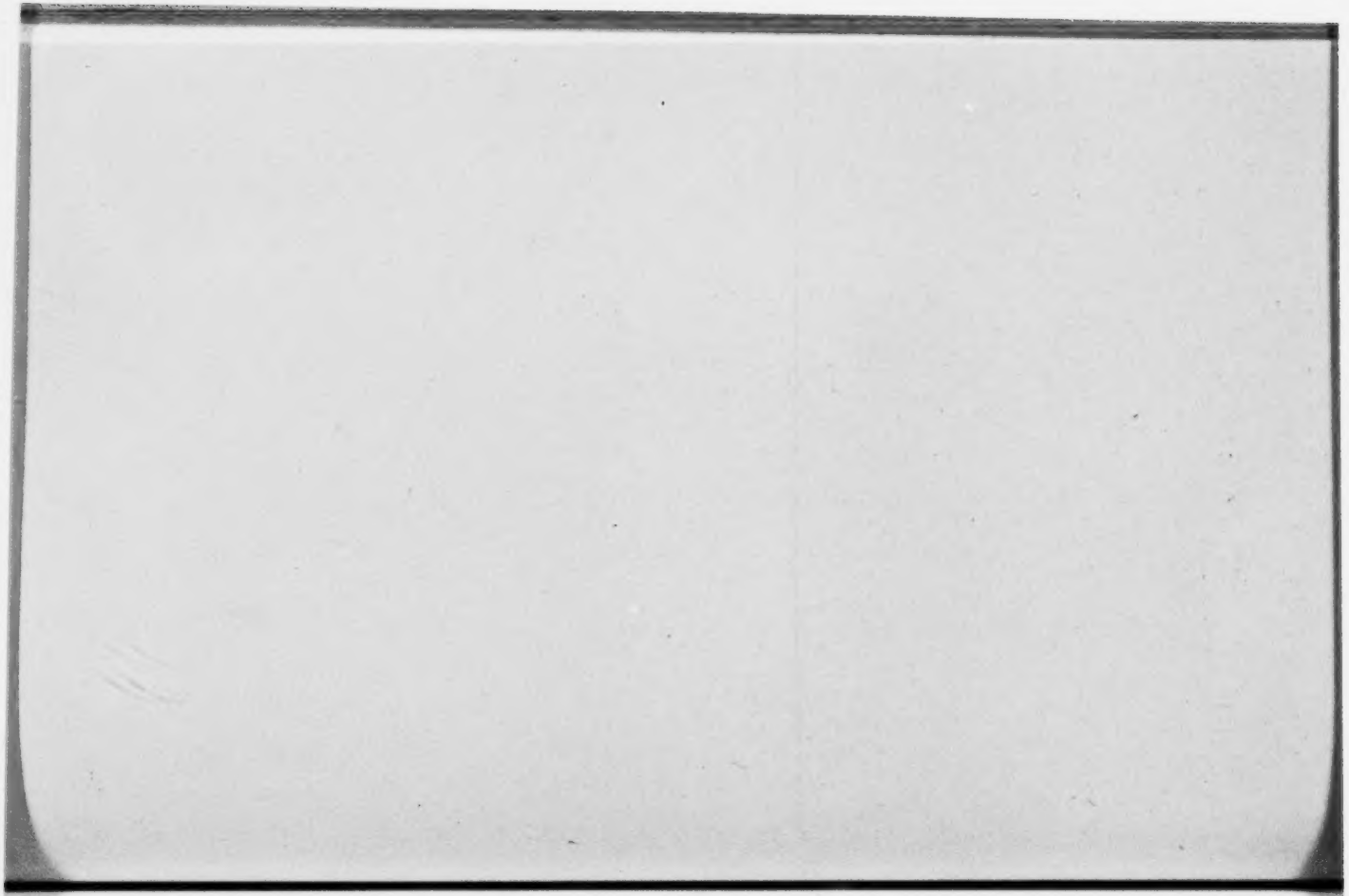

INDEX.

	PAGE
Opinions Below	1
Summary Statement of Facts	2
Arguments	13
Conclusion	39

AUTHORITIES CITED.

Ky. Code of Practice, sec. 528	19
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 341, 53 S. Ct. 98	32
Campbell v. Holt, 115 U. S. 620	33
13 C. J., p. 2345	32
67 C. J., p. 299, sec. 5	23
Ex parte Converse, 137 U. S. 624	33
George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. Ed. 1268, 53 S. Ct. 620	32
Grosjean v. American Press Co., 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444	32
16 Harvard Law Review 135	28
Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841	32
Interstate Commission v. L. & N. R. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185	32
Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. Rep. 143	29
Meredith v. City of Winter Haven, 64 S. Ct. 11	30
Miles v. Ashby, 174 S. W. (2d) 753	20
Storey, Partnership, paragraph 99	28
Truax v. Corrigan, 257 U. S. 312	30
Turpin v. Lemon, 187 U. S. 51, 47 L. Ed. 70, 23 S. Ct. 20	32
Tyson & Bros. v. Blanton, 273 U. S. 418, 47 S. Ct. 426	33
2 V. E. S. and B 218	28
Wilmer v. Thomas, 13 L. R. A. 380	29

IN THE

Supreme Court of the United States

October Term, 1943.

No. 499.

PATRICIA R. O'BRIEN, - - - - - - *Petitioner,*

v.

EDWIN J. O'BRIEN, ET AL., - - - *Respondents.*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

OPINIONS BELOW.

The supporting brief which has already been filed sets out in detail the factual background in regard to most of the facts, as well as the law involved in this case. The supporting brief, in setting out quotations from the opinion of the Court of Appeals, refers to pages of the typewritten copy of that opinion as delivered by the Court of Appeals. For the convenience of the Court, this opinion can be found in 172 S. W. (2d) 595 to 609, inclusive.

SUMMARY STATEMENT OF FACTS.

Never in the history of Kentucky's jurisprudence has there ever been an effort made by certain members of a family to deprive the widow of her husband's property plainer than that evidenced by the record in this case. The relationship which existed between the petitioner and her husband, John A. O'Brien, was a happy one which continued from their marriage in 1925 until his death on January 1, 1934. The relationship between petitioner's husband and his brothers was one of estrangement and hostility, to such an extent that they were not on speaking terms.

It is apparent from the record that when John A. O'Brien became ill, his brothers immediately became interested in what disposition would be made of his property. John A. O'Brien was in a comfortable home, properly cared for by his wife, the petitioner, and while in that home, during the absence of his wife, he disappeared. As to how or under what circumstances he left this home, we have but to surmise. There was nothing that indicated any desire on his part to leave. Therefore, the only deduction to be made is that he was taken away. When the wife returned after an absence of thirty minutes her husband was gone. She immediately began an intensive search but was unable to locate him. She got in touch with an attorney, and they went to the office of James and Edwin J. O'Brien, Jr., and were informed that they knew where he was, but refused to tell his wife, the petitioner. John A.

O'Brien was later found in the home of a brother to whom he had not spoken since 1928. Petitioner and her friends were informed that he was in such a condition that he was too ill to see anyone. Not even his own wife was permitted to enter the house. Armed guards were placed around the property to prevent her and his friends from seeing him.

While at the home of Joseph B. O'Brien, the will of July 7, 1933, was made, taking from his wife all the property except that allowed her under the statutes of descent and distribution. On July 7, 1933, an insurance trust agreement was made which provided that in the event there were no children, then $201,000.00 worth of insurance was to go to the O'Brien brothers.

The happenings at the home of Joseph B. O'Brien and the result of their actions are sufficient to cause any reasonable mind to conclude that there was a conspiracy to get the property of John A. O'Brien for the benefit of the other brothers.

As to what occurred at the home of Joseph B. O'Brien, as related to her by her husband, the lips of the petitioner are sealed by Section 606 of the Code of Practice of the Commonwealth of Kentucky.

It was under the circumstances as set out above that the will and trust agreements were executed.

John A. O'Brien was later found in the Seelbach Hotel in Louisville, without a nurse, without a doctor, undernourished, to die a lonely death away from his wife and his home. After he was located in the hotel, the petitioner took him home and tried as best she could to restore him to health. Exhibits No. 29 and

No. 30 are two pictures which show the difference between the appearance of John A. O'Brien before he was taken from his home and the appearance after his return. After he returned to his home, a new will was prepared. The trust agreement was revoked. For a time after his return his strength returned, and for a while it looked as though he would be restored to health. But on January 1, 1934, he died. On the night of his death his brothers met with their lawyers to discuss the future articles of partnership of the Edward J. O'Brien & Company. The O'Briens and their lawyers were then unaware of the execution of the will of September 22, 1933, and probably were unaware of the execution of the papers which revoked the insurance trust. Because on the day that the petitioner offered the will of September 22, 1933, the Judge of the County Court informed them that the O'Brien brothers' attorney had stated to him that he wanted to be called if a will was offered for probate. The attorney was called and came to the court house and stated that there was a will of a later date. When the trust agreement was found this attorney seemed surprised and astounded when he was informed that the insurance trust had been revoked. The attorney at the time stated that "suit will be filed to contest the revocation."

Prior to the death of John A. O'Brien, after his death, and up to the consummation of the agreement to purchase petitioner's interest in the Edward J. O'Brien & Company, the conspiracy continued to get the interest of John A. O'Brien in the company, to get

his insurance, and to deprive the petitioner, the widow of John A. O'Brien, of her rights.

The Probate Court probated both wills. The second will was probated as a codicil to the first will. In January, 1934 the attorney for the O'Brien brothers told the Vice President of the Louisville Trust Company to demand of the insurance companies that they not pay to the petitioner under the policies. The petitioner prepared the necessary proof of loss for the collection of the proceeds of the insurance policies, and employed counsel to represent her. The attorney for the O'Brien brothers insisted that they would claim under the insurance trust and prevent its payment until petitioner sold her interest in the Edward J. O'Brien & Company.

In further pursuance to this conspiracy, the petitioner was informed that unless she submitted to their wishes to sell her interest in the Edward J. O'Brien & Company, they would incorporate the business and freeze out her interest and she would receive less than one hundred thousand dollars. Not satisfied, and being unable to accomplish their purpose, then as an additional threat petitioner was informed that there was a suit pending against the directors of the National Bank of Kentucky, and that Edwin J. O'Brien, Jr., was one of them, and that if a judgment was rendered against the directors, including Edwin J. O'Brien, Jr., in such litigation, that her husband's interest would have to bear such proportionate part of such liability as Edwin's would have to bear. These threats and consistent repetition thereof could have

been only for the purpose of impressing upon the mind of the petitioner that she was in danger of losing all except a small amount unless she submitted to the wishes of the O'Brien brothers. The plan finally succeeded. The purpose of the conspiracy was finally accomplished by the insurance threat, by the statement they would have the last will construed to mean only personal effects, by the statement that she would only receive a dower in real estate owned by the partnership, by the statement that they would incorporate the company and freeze out John A. O'Brien's interest, by the statement that John A. O'Brien's interest would have to bear the proportionate part of an expected judgment against Edwin J. O'Brien, Jr., in the National Bank of Kentucky litigation, and finally by the concealment of material facts relating to the value and by misrepresentation of what the actual value of the company was, they caused her to unwillingly remove herself from the position of a silent partner in the Edward J. O'Brien & Company, a position which would have permitted her to enjoy the profits of this company for a period of five years, and to unwillingly sell to the O'Brien brothers, by and through James O'Brien, the interest of her deceased husband in this company, for $380,000.00 when they knew that the interest was worth at least the undisputed value in the record of $723,000.00. It is true that before this agreement was consummated the petitioner was represented by counsel. As to what transpired at the conference, according to the testimony of L. R. Curtis, an attorney, and one of the witnesses on John A. O'Brien's

last will and insurance trust agreement revocation, said:

> The incorporation of the company, as a matter of fact, I thought that—it is impressed upon my mind very clearly—was exactly what would be done, if a trade was not made, and she would be frozen out, as a matter of fact. (Tr., Vol. 7, p. 804, q. 62.)

It is true that an auditor was present at the different conferences relating to the consummation of the sale of petitioner's interest in the partnership. This auditor was there for the purpose of making an audit if petitioner had been granted permission, but this permission was never granted. This auditor at the time of these conferences was employed by the firm of Ernst & Ernst, while at the trial he was a Certified Public Accountant employed by the United States Government.

As to what transpired at the conference just before the contract for the sale of the interest was signed, Mr. Wirotzious testified:

> She was taking an awful whipping over there that day. I really felt sorry for her, but there wasn't anything I could do. Mrs. O'Brien sat over there at one side of the room and she said a dozen times or more "I don't want to sell my interest. Why should I take my money out of that company, where I am getting a good return, to invest it in something that is not so good? I want to stay in." (Tr., R., Vol. 2, p. 223, q. 68; p. 225½, q. 80.)

As to the circumstances under which this contract was concluded, this same witness (Wirotzious) stated:

> At the conference, there was the same general threat at that time of incorporating the company, freezing out her interest, and they told her at that time she wouldn't get more than $100,000 for her interest. There was the same threat made at that particular meeting where it was stated that they would sue on the insurance trust agreement and would win on it unless she would sign away her interest. She said, "How do I know you have the insurance releases if I sign this paper?" Mr. George Caldwell, Vice President of the Louisville Trust Company, said, "They are right here in this pocket." Mrs. O'Brien said "Can I see them?" and at that time Mr. George Caldwell said "I will show them to your attorney, but I will not show them to you." Those things were very definitely fixed in my mind because of the treatment accorded a woman by a bunch of men whom I thought were gentlemen. I had never seen anything like that. It makes my blood boil every time I think of it. (Tr., R., Vol. 2, p. 226, answer to q. 82.)

We have set out the above facts in order that the Court may understand under what circumstances the petitioner lived during her marriage to John A. O'Brien and under what circumstances her husband died and the circumstances from the date of his death that led up to the signing of the agreement for the sale of petitioner's interest in the Edward J. O'Brien & Company.

In reply to that part of respondents' brief on page 7 which quotes from the opinion of the Court of Appeals in regard to the conduct of the trial judge, and especially to that part of the brief and opinion which refers to the patience of that judge, we desire to call the Court's attention to this same chancellor's conduct during the trial in the Chancery Court of Jefferson County. The original action was filed in the Jefferson Circuit Court for the purpose of setting aside this agreement. The original petition was prepared by Hon. E. C. O'Rear, twice Chief Justice of the Court of Appeals of Kentucky. In March, 1938, the Chancellor announced, apparently on his own motion:

> The Court is of the opinion that petition does not state a cause of action, and it is ordered by the Court that this action be remanded. Plaintiff is hereby given leave to reform, but not to amend, her pleadings. (Tr. R., Vol. 1, p. 70-73.)

We would likewise refer to the comment of the Court on the petition of that highly respected lawyer and former Judge of the Court of Appeals of Kentucky, in which the Chancellor said, in substance:

> I want to pay my respects to that document. It is a most iniquitous pleading, and shrewdly and cleverly drawn for the purpose of confusing. (Tr., Vol. 24, p. 26-27.)

Then on March 17, 1938, the record shows the Chancellor wrote this:

> The Court is of the opinion that the petition does not state a cause of action, remands the case.

> Plaintiff given leave to reform, but not to amend, her pleadings. The Court of the opinion that the petition violates every canon of good draftsmanship, and of the further opinion that plaintiff's lawyers know better, declines to allow so deliberately barbarous a piece of legal work to be patched up. Replead, but not amend. (Tr. R., Vol. 1, p. 73.)

This was written of Judge E. C. O'Rear, who for two terms as a Judge of the Court of Appeals of Kentucky, and twice its Chief Justice, wrote some of the ablest opinions ever written by a Judge of that Court. He is convicted by the Chancellor of a willful, deliberately barbarous, and iniquitous piece of legal work in the drafting of the petition.

Comparable to the above remarks relating to the Honorable E. C. O'Rear is the description by the Chancellor of Mrs. John A O'Brien, the petitioner in this case, as having, because of her ignorance and inexperience, baited a trap for the O'Brien brothers, who were men of long and successful business experience. In the opinion at the conclusion of the trial the lower Court wrote:

> Shall equity allow a trap to be baited with apparent satisfaction and sprung by injured innocence? (Tr. R., Vol. 3, p. 402.)

Thus, ignorance and inexperience, and indeed the innocence of the litigant, is inverted, and is pictured as a trap for the successful, the influential and powerful.

The Court recognizes the duty of full and complete disclosure, and yet in his opinion (Tr. R., Vol. 3, p.

385) finds that no relation of confidence existed between the parties, saying:

> All that is out, and I am not going to bother with it.

The Chancellor, when the petition was reformed, and when the reformed petition attempted to adopt the allegations of the original petition by reference, took his pen and of his own volition struck out this portion of the reformed petition. Likewise, he struck out the word "concealment," and in lieu thereof in his own hand substituted the word "undisclosed." As to undisclosure, the Chancellor found that Mrs. O'Brien was guilty of bad faith in not seeing to it that the defendants O'Brien disclosed to her what was in their power to reveal to her. Is it possible that the Chancellor distrusts ignorance and inexperience, and exalts the shrewd, the successful and the powerful, just as he convicts the Honorable E. C. O'Rear of a willful, deliberately barbarous and iniquitous piece of legal work in the drafting of the original petition?

The Chancellor who had made these comments about an able lawyer and a litigant in his Court, during the trial of the case, when material and relevant and competent evidence was being introduced on the subject of Mrs. Patricia O'Brien's having to borrow money to live on while her insurance money was being held up by the O'Briens, arose from the bench and said:

> You can go ahead and put that in as far as I am concerned, I am going out to get myself a cup of coffee. I won't listen to any more of it. I won't

> listen to any more about that woman, I mean Mrs. O'Brien, borrowing money. (Tr., Vol. 3, pp. 319, 324, Exhibit 34.)

and proceeded to walk from the court room, leaving the trial in grogress.

The petitioner was confronted with every obstacle not only in the consummation of the agreement, but in the litigation which resulted therefrom as well.

In reply to respondents' brief, page 24, in regard to the Chancellor's rulings, he held that John A. O'Brien was fully competent to make a will on July 7, 1933, but intimated that there was serious doubts as to his mental competency to make the will of September 22, 1933, although Dr. Heman Humphrey, the family physician and a first cousin of the Chancellor, and L. R. Curtis, a Louisville lawyer, both testified without reservation that John A O'Brien was fully competent to make the September 22, 1933, will, and was competent up until the date of his death on January 1, 1934, and there is no testimony to refute the statement of these two witnesses, nor the statement of Dr. Overstreet, another physician, who attended John A. O'Brien during the entire time he was ill. Dr. Humphrey and Mr. Curtis witnessed the September 22, 1933, will and all insurance trust agreement revocations. (Tr., Vol. 7, p. 749, q. 17; p. 838, q. 17.)

ARGUMENT.

DENIAL OF PETITIONER'S MOTION FOR SUBPOENA DUCES TECUM.

In reply to that part of respondents' brief on page 12 as to what records were in the possession of the petitioner and her counselors and advisors, this record discloses that Edward P. Humphrey, petitioner's attorney, in making the settlement, George G. Caldwell and J. G. McPherson, co-administrators, testified that all they had during the negotiations to settle on was the 1933 and 1934 audits of the Edward J. O'Brien & Company, and Exhibit 22; that they never at any time during negotiations saw any subsidiary audits or any appraisals either of the Edward J. O'Brien & Company or the subsidiaries, and that they never at any time had any prior year audits. In support of this statement, we desire to quote from the testimony of Edward P. Humphrey, J. G. McPherson and George G. Caldwell.

Mr. McPherson, one of the co-administrators, and Vice President of the Fidelity & Columbia Trust Company, admits that he never had any records of the Edward J. O'Brien & Company from which to figure values, except the audits of 1933 and 1934, and Exhibit 22 (Tr., Vol. 16, pp. 1614; Vol. 19, pp. 1769, 1770).

Mr. McPherson was asked this question (Tr., Vol. 19, pp. 1774-1775, q. 14):

> What steps did you take to find out whether the figure of $425,000 was correct or whether it was of greater value, taking in consideration market

value, appraised values, upon physical assets, property, plant and equipment, and tobacco inventory and the rest?

His answer was "None."

This witness was asked by Judge Humphrey:

If you had known that the O'Briens had falsified their information and that the partnership interest should have had a book value of $800,000.00, would you have considered $380,000.00 a fair value?

His answer was "By no means" (Tr., Vol. 17, pp. 1629-1630).

George G. Caldwell, Vice President of the Louisville Trust Company, which was one of the co-administrators, in response as to what audits he had in his possession prior to the time his Trust Company approved the sale, said (Vol. 19, p. 1789):

Q. 47. So at no time did you have either the subsidiary audits or access to them in any way while this deal was pending for the sale of John A. O'Brien's interest or share in the partnership of the E. J. O'Brien & Company?

A. I don't know about access to them. We did not have them, at least I did not have them.

Q. 48. I don't want to quibble with you about words, but did you see them or have them or have them made available to you prior to that time?

A. No.

Caldwell stated that (Tr., Vol. 16, pp. 1537, 1538) except for the 1933 and 1934 audits and Exhibit 22, which shows the figure of $425,649.45, he had no further information. He made no investigation of excessive depreciation (Tr., Vol. 19, p. 1779). He made no investigation of the tobacco inventory of O'Brien & Company or its subsidiaries (Tr., Vol. 19, p. 1782). Caldwell affirms (Tr., Vol. 19, p. 1790) that Judge Humphrey's statement of his testimony is correct, to this effect:

> I think it is clear that the witness (George Caldwell) did not have them and he did not know of anybody else having them, that is, anybody else including the Fidelity & Columbia Trust Company, Patricia O'Brien or any of her professional representatives or any of her friendly advisers. I think that is what the witness says.
> Q. 52. Is that a correct statement, do you adopt that?
>
> A. That is correct (by Caldwell).

Although it is true she was represented by administrator and attorneys, the record above shows that neither the attorneys nor the administrators made any investigation to ascertain whether the amount of $425,000 represented on Exhibit 22 was the correct market value of John A. O'Brien's partnership interest.

Ed P. Humphrey describes the reason for his approval:

> There never would have been any trade if we had ever been convinced that the interest in the partnership was worth anything like the figure I was

> named. (This was $850,000.) I think I can clear it all up by saying we accepted this value of $425,000 as the basis of the negotiations, and relied on the books as being correct. (Tr., Vol. 15, pp. 1456, 1457.)

On pages 1415, 1416, Tr., Vol. 15, Ed Humphrey says:

> I told him I did not know anything about that, but I assumed they put down on the books what they thought they were worth. (He is here speaking of the subsidiaries.)

Again on page 1421, Tr., Vol. 15, Ed Humphrey says:

> No, Judge, I examined those audits (referring to 1933 and 1934) with her when she first brought them in. I cannot say I analyzed them, but I examined them, but when she employed an expert auditor of Ernst & Ernst to conduct her examination of the O'Briens' accounts, so far as she intended to have that made I felt like I was relieved of the responsibility of checking those figures.

Wirotzious (Tr., R. Vol. 2, p. 198) said:

> I told Mrs. O'Brien on several occasions subsequently that it was not possible for me to take an audit report prepared by some other auditor and say that it was right or wrong. That the only way in which I could determine the correctness or incorrectness of the report would be to make an examination myself or for my associates to make an examination.

This same witness (Tr., R. Vol. 2, p. 222, answer to q. 67) said:

> She asked that she be permitted to have the books of the Edward J. O'Brien & Company audited from the date of Edward J. O'Brien, Sr.'s death in 1928 up to the date of the proposed sale, which would have taken us up to November 5th or November 15th, 1935, which is right close to the date, as reflected in the 1935 audit report, of the sale of her partnership interest.

Again this witness stated (Tr., R., Vol. 2, p. 223):

> She said "I want an audit made. I am willing to pay for it." And further, it was always my understanding that she wanted to pay for the audit because on the occasions that I talked with her, my firm rendered a bill to her and she paid it out of her personal funds.

The testimony quoted above refutes entirely the statements made in respondents' brief on page 12, as well as the opinion of the Court of Appeals as to what audits the petitioner had before her rather than the information claimed to have been in her possession by respondents as set out as A, B, and C on this page. It also shows she was denied the right to have an audit made, contrary to statements in respondents' brief, page 13.

In the trial court, petitioner filed in support of her motion for subpoena *duces tecum* the affidavit of Hugh A. White, a Certified Public Accountant and a senior member of the firm of White, Bower & Prevo of De-

troit, Michigan. This affidavit is found in Tr., R. Vol. 3, pp. 261, 262. In this affidavit this accountant says that he has also been called upon to advise plaintiff and her counsel with respect to proper accounting methods and practices which should be employed in obtaining adequate information upon which to base competent testimony in support of plaintiff's petition in this cause; that deponent has made a study of various documents, papers, letters, and memorandum furnished to him by plaintiff and her counsel and has been engaged in a review of these documents for the purpose of furnishing an accurate analysis reflecting the true value of the interest of the estate of John A. O'Brien, deceased, in the partnership of E. J. O'Brien & Company during the aforesaid period 1931 to 1935, and also up to the end of the five-year period following the death of John A. O'Brien.

On page 268 of this affidavit, deponent says:

> It is necessary to see all of the books, records and disbursements of original entry, and particularly the general ledger, private ledger, cash receipts and cash disbursements records . . .

Under Rule 34 of the new Federal Rules of Civil procedure quoted in respondents' brief, page 15, upon proper showing a party may require the production of documents. In this case we have shown that petitioner at the time the contract was signed did not have in her possession any documents that showed the condition of the Edward J. O'Brien & Company, and the witnesses in this case whose testimony we have quoted show that the only way that the true picture of the condition of

the company could be ascertained was from an examination of the records requested by petitioner, and therefore in denying petitioner these records it not only violated the due process clause of the Constitution, but also violated section 528 of the Kentucky Code of Practice as well as this rule.

On page 17 of respondents' brief there is set out the ruling of the Chancellor on petitioner's motion for subpoena *duces tecum*. What petitioner had at the trial was little more than what was before her at the conference during negotiations. This is fully answered in our supporting brief filed with the petition for writ of certiorari on pages 33 to 37.

On page 25 of respondents' brief they quote from the Chancellor's finding of facts that respondents furnished to petitioner all the information in their possession. In reply to that part of this brief we desire to call the Court's attention to the following items which were not considered by either the trial court or the Court of Appeals.

The Court of Appeals' opinion in passing on the law as to dealings between partners, says:

> Specifically in the exercise of their duty the purchasers of the interest of John A. O'Brien in the partnership were obliged to deal fairly with Mrs. O'Brien and voluntarily disclose full and accurate information concerning the business, its affairs and values. Their duty was not passive. It was active.

Since the retention of the opinion by the Court of Appeals in this case, the same doctrine was upheld by

the Court of Appeals of Kentucky in Miles v. Ashby, 174 S. W. (2d) 753.

Under the authority of these cases, each partner is the confidential agent of the other. Each is entitled to a full disclosure of all material facts within the knowledge of the others relating to the partnership affairs.

Under Article VI of the partnership agreement, it is provided:

> In the event the estate elects to withdraw from the partnership at the expiration of Five (5) years, then the interest of said decedent shall be the value of the interest, as shown by the books of the company, or by appraisement, plus profits and interest if any.

The respondents in this case had full knowledge of all of the affairs of the partnership. They were in possession of all of the records of the partnership. The petitioner not only was unfamiliar with the affairs of the partnership but she was unfamiliar with the manner in which the business was being conducted at the time of the purchase. Under the law she was entitled to a full disclosure not only of the affairs, but is entitled to have the original books of entry disclosed either to her or to those representing her in a transaction of this character. Without being afforded this opportunity she was compelled almost by force and if not by force, at least by threats at the time the contract was signed. The force began prior to the death of her husband when he was confined in the home of one of his brothers without his wife, the petitioner in this

case, being able to see him. The petitioner was threatened with a dissolution of the partnership and the formation of a corporation. She was threatened with a suit to have the will of her husband construed as to whether that will devised to her only the household effects or his entire personal estate.

It was under such circumstances that the contract was finally consummated between the petitioner and the respondents. The basis for the settlement was determined from Exhibit 22 which was prepared by the respondents.

PLAINTIFF'S EXHIBIT 22.

(Given Plaintiff to settle on)

Present Interest		$425,649.45
Real Estate	$331,873.95	
Pro Rata based on capital	23.77%	78,886.44
		$346,763.01
Her ⅓ Life Interest Real Estate 23¼% of $78,886.44		18,341.10
		$365,104.11
Depreciate wholly owned subsidiaries 50% 252,500 at 50%—$126,250 at 23.77%		30,009.62
		$335,094.49
Remainder Interest in $50,000 Life Ins.		17,500.00
		$317,594.49
½		$158,797.25

In the preparation of this exhibit no consideration was given to the following items:

John A. O'Brien's Share of the 1935 Profits of the Edward J. O'Brien & Company, Amounting to $17,185.07.

An examination of the opinion of the Court of Appeals of Kentucky revealed that the sole reason for denying a recovery of John A. O'Brien's share in the profits made for the year 1935 was:

> It appears that the profits could not be definitely ascertained until the end of the fiscal year, November 30, after inventories had been taken.

It is true that profits could not have been accurately determined until the end of the fiscal year which ended on November 30, 1935. The contract was signed on November 15, 1935. According to the testimony of Edwin J. O'Brien, Jr. (Tr., Vol. 13, pp. 1169-1171), the profits for the entire year could have been ascertained in from three to five days. As a matter of fact, an inventory was taken on July 1st and on September 1, 1935, and therefore the profits could have been ascertained at that time.

The amount of this item is not disputed. The fact that this item was not disclosed is not disputed. The opinion of the Court of Appeals, however, disallowed this item because petitioner waived her right to disclosure of the 1935 profits under her contract of acceptance. Certainly a person should not be bound by an acceptance of something concerning which she had no knowledge.

The record discloses that Mrs. O'Brien, the petitioner, was informed that there were no profits nor in-

creases for 1935, and that the Edward J. O'Brien & Company had operated at a loss. This is shown by the testimony of Mrs. O'Brien, Mr. Wirotzious, Mrs. Blickenstaff, and Mr. Shonkwiler (Tr., Vol. 6, pp. 646, 647, 709; and Vol. 7, p. 723). On this point Mr. Wirotzious testified as follows:

> It was late in the year, for the year ended November 30, 1935. In other words, approximately eleven months of the fiscal year had expired and they were apparently—the partnership was in position to know the profits for the period and Mrs. O'Brien asked at that time what the dividend would be for the year up to the time they were asking her to sell. Mr. Barker said "There are no profits this year, we made a loss."

The O'Briens knew the amount of profits made by the company at the time the contract was made, and certainly they knew the exact amount of the profits for the year 1935 when the contract was finally concluded. The contract was not concluded until February 1936, and yet during all of this time prior to and after the contract was signed, the petitioner had no knowledge of this item of profit. No one can be said to have waived that which he did not know. (67 C. J., p. 299, Sec. 5.)

If petitioner had been given an opportunity to examine the records which she requested of the trial court, then she would have been in a position to know the exact status of the affairs of the company, and with this knowledge she would then have been in a position to deal fairly with the O'Briens. Under the partner-

ship agreement she was entitled to these profits. Under the law it was the duty of the respondents to disclose the fact that a profit had been made in 1935, but without the records she had no opportunity to ascertain this fact.

Petitioner Was Entitled to John A. O'Brien's Share of the Excess of the Book Value of the Subsidiaries Over the Value Thereof as Shown on the Books of the Edward J. O'Brien & Company Which Represents the 1935 Profits of These Subsidiaries—$5,697.47.

What has been said in regard to the profits made during the year 1935 of the Edward J. O'Brien & Company appears with equal force as to this item. The failure to disclose its value was even a more flagrant breach of the duty of the O'Briens. They represented on Exhibit 22 that the subsidiaries were worth only fifty per cent of their 1934, not 1935 book value as shown on the books of the Edward J. O'Brien & Company. This item had been definitely determined prior to the signing of the contract with the petitioner.

The fiscal year of the subsidiaries ended on October 31st of each year, and the audit of these subsidiaries for the year 1935 had already been made, and this audit showed a net profit of $24,108.41. And yet the petitioner was compelled to accept the representations made by the respondents as to the value of these subsidiaries without being given an opportunity of ascertaining what the real facts were in regard to the actual value.

The Edward J. O'Brien & Company wholly owns various subsidiaries, and these subsidiaries were worth at least the book value rather than fifty per cent of the book value, as contended by the respondents. Again, this information was in possession of the respondents, and the petitioner had no information as to these values, and under the ruling of the trial judge, was denied an inspection of the original records for the purpose of finding out whether or not the O'Briens were making a full disclosure of all of the assets.

Petitioner Is Entitled to John A. O'Brien's Share as to the Increase in the Value of the Securities Held by the Edward J. O'Brien & Company—$22,262.06.

The Court of Appeals of Kentucky in refusing to allow this item, although admitting it was respondents' duty to disclose full and accurate information as to partnership values, yet this opinion holds that the partners do not have to disclose the value of securities held by the firm because the petitioner could by her own investigation have ascertained the value of these securities.

Where a fact is misrepresented or where one of the persons has this particular information and fails to divulge it to the person with whom he is dealing, and the person that does not possess this information acts on the statements of the other, the person deceived or misled has the right to have a Court of Equity correct a contract concluded under such circumstances.

Because of the relationship between the contracting parties and the failure of the court to compel a full disclosure, amounts to a denial to the petitioner of equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Petitioner Was Entitled to John A. O'Brien's Share of the Excess of Appraised Over the Book Value of the Property, Plant and Equipment of the Subsidiary Companies for 1935—$8,890.51.

The Court of Appeals in its opinion denied a recovery on this item upon the theory that there was an election to sell on book values while it is undisputed that the appraised values of the subsidiaries exceeded the book value by $41,837.20. This amount was never disclosed. The value of John A. O'Brien's share of this item is the amount set out above. The respondents never disclosed any records or gave any information other than book value. Then they proceeded to advance claims that the real value was less than the book value. The modified opinion of the Court of Appeals intimates that respondents furnished to petitioner and her advisors a 1935 appraisal of the Edward J. O'Brien & Company. The record conclusively refutes such belief (Caldwell, Tr., Vol. 19, pp. 1779-1789; McPherson, Tr., Vol. 17, pp. 1614, 1629-1630; Vol. 19, pp. 1769, 1774, 1775; Humphrey, Tr., Vol. 15, pp. 1421, 1456, 1457). If the Court insists that the partnership interest was purchased on the basis of book value, then pe-

titioner was entitled to disclosure of such book value. Respondents knew when the contract was signed in 1935 that the book value of the subsidiaries as of June, 1935, was $307,500.00, and not one-half or fifty per cent of $252,500.00, or $126,250.00 (Exhibits 60, 61, 62, 63, 22). This item alone makes a difference of $181,250.00 in value misrepresented by the respondents.

Petitioner Was Entitled to John A. O'Brien's Share of the interest on Edwin J. O'Brien's Capital Deficiency and Overdraft—$36,477.70.

The records in this case disclose that Edwin J. O'Brien, Jr., withdrew from the firm all of his capital, interest in the partnership plus an overdraft of $144,000.00, and yet in the negotiations of the settlement with the petitioner she received no accounting for the interest on any part of this overdraft.

Mr. McPherson, Vice President of the Fidelity & Columbia Trust Company, one of the co-administrators, and Mr. Richardson, the auditor of the Edward J. O'Brien & Company, as well as Mr. Hugh A. White, an auditor, admit that from the 1934 audit of the Edward J. O'Brien & Company the last audit upon which the settlement was based, it could not be determined whether or not any interest was charged on Edwin J. O'Brien, Jr.'s capital deficiency and overdraft. (Tr., Vol. 17, pp. 1622-1623; Vol. 17, pp. 1624-1625; Vol. 20, p. 1886.)

These five items amount to the total sum of $90,-512.81. Yet for the entire period from November 30,

1934, to November 15, 1935, neither the petitioner nor any of her representatives were told a thing as to profits, depreciation or increases in the assets of the partnership. This record discloses that respondents failed to deal fairly with petitioner and that under the rulings of the trial court, she was denied her motion for subpoena *duces tecum* and by such denial could not obtain information sufficient to base or form an opinion as to the value of her interest in the partnership.

Goodwill.

In attempting to arrive at the value of the interest of John A. O'Brien in the partnership, no valuation was placed on the goodwill of the firm. This partnership had been in existence since 1880. Again we say that the value of goodwill cannot be established without the records asked for before the trial judge.

Goodwill means benefits which arise from the establishment of a particular trade or occupation. This advantage or benefit acquired by an establishment is something that is beyond the mere value of the capital, stocks, and other property of the firm or corporation. It has a value because of the reputation for affluence, or punctuality, or the character of merchandise sold. (Storey, Partnership, paragraph 99, 16 A. J. 87.)

Goodwill of a business is a valuable right of property. (2 V. E. S. and B 218, 16 Harvard LR 135.) Goodwill may be mortgaged, assigned or taken in execution in connection with a business. (39 L. JCHN 579.) Goodwill passes under a general assignment for

the benefit of creditors. (Wilmer v. Thomas, 13 LRA 380.) The purchaser of goodwill and a firm name is entitled to the advantages of the business. Goodwill may be assessed for taxes. When a partner retires from a firm assenting to or acquiescing in the retention by the other parties in the possession of the old place of business and the future conduct of business by them under the name, then that name remains with the purchaser. (Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. Rep. 143.)

The petitioner in this case was not familiar with the value of this asset.

The Court of Appeals in its opinion sets out that the petitioner and her representatives had possession of the 1934 audit of the Edward J. O'Brien & Company made by a competent firm which showed not only the condition of the business, but the various assets owned by the firm.

> This purported statement or audit was not one made for the purpose of selling the business but one made for the purpose of making an income tax return. According to the testimony of Hugh A. White of the firm of White, Bower & Prevo of Detroit, neither this audit or the audits made available to petitioner at the trial were of the kind such as to form a basis of a settlement between partners. (Tr., Vol. 20, pp. 1897, 1898, 1899, 1900, 1901.)

An audit for income tax purposes, as is well known, takes every kind of deduction as it is possible to make. Therefore, the audits, if they were audits at all, were

not the proper kind upon which to base an opinion as to the real condition of the firm. The only way that the true condition could be determined was by an audit made from an inspection of the records of original entry. This was denied to the petitioner by the trial judge. By such a denial the petitioner was denied the principle of right and justice guaranteed to her under the due process clause of the Fourteenth Amendment.

By the failure of the court to consider any of the items set forth above, it amounted to an arbitrary and capricious exercise of power by which the petitioner was stripped of all real remedy, and is wholly at variance with the spirit of the Constitution in depriving her of her property rights.

This court in Truax v. Corrigan, 257 U. S. 312, in determining what are the rights guaranteed under the Fourteenth Amendment, said:

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy.

In the case of Meredith v. City of Winter Haven, 64 S. Ct., p. 11, the Court said:

> In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. Commonwealth T. Co. v. Bradford, 297 U. S. 613, 618, 56 S. Ct. 600, 601, 80 L. Ed. 920; Risty v. Chicago, R. I. & P. R. Co., 270 U. S. 378, 398, 46 S. Ct. 236, 240, 70 L. Ed. 641; Kline v. Burke Const. Co., 260 U. S. 226, 234, 235, 43 S. Ct. 79, 82, 83, 67 L. Ed. 226, 24 A. L. R. 1077; McClellan v. Carland, 217 U. S. 268, 281, 282, 30 S. Ct. 501, 504, 505, 54 L. Ed. 762. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

An opportunity for a fair hearing is one of the essential elements of due process where it is necessary for the protection of the parties. No man should be punished or deprived of his property rights without an opportunity of being heard. No one may be legally divested of his property rights unless he is allowed a hearing before an impartial tribunal. And, in addition to this, he must have an opportunity to contest the claim set up against him, and be allowed to meet it on the law and facts for the purpose of showing whether or not it is unfounded. A full hearing is where

one has ample opportunity by evidence and argument to fairly show his or her side of the controversy. There is no hearing when the party is not given an opportunity to examine the evidence. Such a hearing is a matter of right, and when denied it violates one of the essential elements of due process. (Turpin v. Lemon, 187 U. S. 51, 47 L. Ed. 70, 23 S. Ct. 20.) (Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841.) (12 A. J., Sec. 607, p. 301.) (George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. Ed. 1265, 53 S. Ct. 620.) (American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 341, 53 S. Ct. 98.) (Interstate Commission v. L. & N. Railroad Co., 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.)

Due process under the provisions of the Fourteenth Amendment embraces the right of a person to be free not only from physical restraint, but also in the enjoyment of all of his faculties. (Grosjean v. American Press Co., 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444.)

Due process of law requires an ordinary proceeding adapted to the nature of the case, in which proceeding the citizen has the right for an opportunity to be heard by establishing any fact which under the law would be a protection to him or to his property. (13 C. J., p. 2345, para. 1009.)

"Day in Court" means the right of a party to introduce evidence, and any judgment which is rendered without these modes of procedure or in disregard of them is not due process of law. A subpoena *duces tecum* is due process where it appears that the books and papers sought for are relevant and material to the

matter under consideration. (C. J., Note p. 1237, para. 1011.)

The matter under consideration in the trial before the Judge of the Chancery Court of Jefferson County was the value of the interest of the petitioner in the Edward J. O'Brien & Company. There was no way that the value of this interest could be determined without an opportunity to inspect the records of the company. She proceeded in an orderly way for the purpose of securing this necessary proof. She applied for a subpoena *duces tecum* as provided by the Civil Code of Kentucky. She was denied the right and thereby deprived of a valuable interest in the firm. This was a property right. (Campbell v. Holt, 115 U. S. 620.) (Tyson & Bros. v. Blanton, 273 U. S. 418, 47 S. Ct. Rep. 426.)

In the opinion of the Court of Appeals of Kentucky, several cases are cited in support of its holding that there was no violation of the Fourteenth Amendment to the Constitution. One of these cases is Stephenson v. Kirtley, 269 U. S. 163. That opinion, however, merely holds that the effort to perfect an appeal to the Supreme Court was a collateral proceeding to set aside a judgment of a Court of General Jurisdiction. Certainly this opinion has no bearing on the question involved in the case at bar.

Another case is *Ex parte Converse,* 137 U. S. 624, but this case relates to the denial of a writ of *habeas corpus,* but in this opinion the court holds that it is a violation of the Fourteenth Amendment if a party

is deprived of her property by any arbitrary power, or is arbitrarily deprived of her property.

In the case of Arrowsmith v. Harmoning, 118 U. S. 194, cited in the opinion, it merely holds that the Supreme Court could not take jurisdiction or reverse a case where the State court had merely made an erroneous decision. We agree that if petitioner had been given an opportunity to present all of her facts, and then after having had this opportunity the State court had decided the facts against her, this court, under such circumstances, would not have jurisdiction.

In the case of Jones v. Buffalo Creek Coal & Coke Co., 245 U. S. 328, cited in the Court of Appeals' opinion, it is held that a person is not deprived of due process by the admission of incompetent evidence. The natural inference to be drawn from this decision is that if the party had been deprived of competent evidence then perhaps the court might take a different view of whether or not the Fourteenth Amendment had been violated.

Respondents, in their brief, cite American Railway Express v. Commonwealth, 273 U. S. 269, and in this case it is held that a merely erroneous decision given by a State court in the regular course of judicial proceedings does not deprive the unsuccessful party of property under due process of law. Then this opinion holds that there was nothing in the record that disclosed that there was anything arbitrary or contrary to the fundamental principles of justice. This opinion, as we construe it, holds that this court cannot interfere unless the judgment amounts to arbitrary or

capricious exercise of power, or is in clear conflict with those fundamental principles. In this case, as we contend, the record does disclose that the court arbitrarily deprived the petitioner of her right to introduce proof, that the trial court arbitrarily deprived her of her right to show as to the value of her interest in the Edward J. O'Brien & Company.

Another case cited by respondents is that of Cincinnati, N. O. & T. P. R. Co. v. Commonwealth of Kentucky, 115 U. S. 321. In this case the court holds that under the Statutes of Kentucky, a railroad company had the right to introduce proof before the franchise board as to the value of its assets; that it did introduce proof; that under the statutes it was given the right to appeal; and, therefore, it was not deprived of any of its rights under the Fourteenth Amendment. This opinion certainly has no bearing on the case at bar.

Also cited by respondent was Pittsburg, Cincinnati &c. Railway v. Backus, 154 U. S. 421. In this case the court says:

A hearing before judgment with full opportunity to present all the evidence and the arguments which the party deems important is all that can be adjudged vital. One hearing, if ample before judgment, satisfies the demand of the Constitution in this respect. If petitioner has been given an opportunity to present her evidence, and then on this evidence if the court had made an adverse decision, there would have been no violation, but by being deprived of the right to in-

troduce evidence under this authority she was denied her rights under this amendment.

Respondents cite the case of Union Trust Company v. Garnett, 254 Ky. 573 in support of their argument that the trial court acted within his discretion in denying the motion for subpoena *duces tecum*. In the Union Trust Company case a suit was pending before the Hon. James Garnett, the Judge of one of the Chancery Courts in Jefferson County, Kentucky. An affidavit was filed in support of a motion for subpoena *duces tecum* to require the First National Bank of Falmouth to produce checks and the records showing the deposits of a number of their customers from 1921 to 1934. The court denied this motion, and the opinion in this case shows:

If counsel for plaintiff will prepare a motion setting forth the records which he believes are competent evidence to be heard on the trial of the action, the court, if convinced such records are material, will require the witness to produce them.

The Court of Appeals, in explaining the judgment, said:

> It was necessary for Logan and Hubbard to file, in support of their motions, an affidavit or some trustworthy statement satisfactory to the court, identifying with reasonable certainty the things desired to be included in the subpoenas *duces tecum*, for without such, on an appeal from the court's dverse ruling, it could not be determined by this court whether they had been thereby deprived of competent, material evidence, obtainable by the procedure.

In this case an affidavit was filed by a competent accountant. The only way that he could pass on the value of the assets of the company was by an examination of the books of original entry. The trial court overruled this motion. Without these records the plaintiff was deprived of her "day in court" because without proof to show the incorrectness of Exhibit 22 she could not establish her claim.

The case of Corry v. Campbell, 154 U. S. 629, cited in respondent's brief is merely a case that holds that this court has no right to correct errors of a State court made in regard to assessments made by a municipality.

The case of Castillo v. McConnico, 168 U. S. 674, cited in respondent's brief holds that when a State court decides a particular formality was not essential, it presents no Federal question, provided it does not violate the Constitution by depriving of property without due process of law. Conversely, if such ruling does deprive of personal property without due process, then this Court does have jurisdiction.

Respondents contend that the trial court and the Court of Appeals held that there were no misrepresentations nor were there any concealments, nor did they fail to disclose the facts. Our answer to that is that the trial court denied petitioner the right to show misrepresentation and concealment of facts. The audits exhibited, it will be recalled, were delivered at 10 a. m. and returned to respondents at 3 p. m. on the same day. The audits that were in the possession of the attorneys and co-administrators acting for the petitioner were

audits made for income tax purposes only, and certainly we all know that there is a difference between audits made for this purpose and audits made to show the true condition of the company. It is contended that the petitioner had an opportunity to have an audit made before the contract was signed. The witness E. C. Wirotzious (Tr. R., Vol. 2, p. 222, answer to q. 67), states:

> She asked that she be permitted to have the books of the E. J. O'Brien Company audited from the date of Mr. Edward J. O'Brien's Sr.'s death in 1928 up to the date of the proposed sale.

Again this witness stated (Tr., R. Vol. 2, p. 223):

> She said "I want an audit made. I am willing to pay for it," and further it was always my understanding that she wanted to pay for the audit because on the occasions that I talked with her, my firm rendered a bill to her and she paid it out of her personal funds.

Therefore, she was demanding the right to have an audit made, and she was denied the right to this valuable information when the contract was signed. The contract was signed after she was denied the right to have an audit made and under the circumstances set out in this brief (Tr., Vol. 6, p. 649).

Again, we desire to reiterate that this petitioner, under a threat of having the will construed as personal effects, under a threat of a suit on the insurance trust agreement, under a threat to incorporate the company, and under a threat to be made liable for the indebted-

ness of one of the brothers of the firm, was compelled to sign the agreement selling her interest in the Edward J. O'Brien & Company. She was demanding that she have the right to settle her insurance separate from that of the sale of her interest in the Edward J. O'Brien & Company. She was denied this opportunity because of the threats. She demanded that an audit be made in order that the value of her interest might be determined, and this was refused to her. In the court, in an effort to set aside this contract, she was again denied the right to have an audit made in order that the court might determine whether she had been fraudulently deprived of her property.

CONCLUSION.

The opinion of the Court of Appeals admits that the Edward J. O'Brien & Company was one of the largest, if not the largest of its kind, in the world. It admits that the parties to the contract under consideration were not on equal footing. It admits that petitioner was a person inexperienced in affairs of business, while on the other hand this same opinion admits that the O'Brien brothers were strong business men, fully acquainted with all of the affairs of the company.

This same opinion held that petitioner was the sole beneficiary under her husband's will; that the O'Briens' claims of the proceeds of the insurance under the insurance trust agreement was a fanciful claim; that partnership real estate was personal property. The result of this opinion was:

1. That for the property, plant and equipment which the O'Briens admit cost one million dollars, petitioner was only given $18,000.00 as her dower interest;

2. On the tobacco inventory of $900,000.00 she was not given any part of the principal or allowed anything for profits;

3. On the goodwill of the firm which should amount to between $700,000.00 and $900,000.00, she was given no consideration; and

4. On the five other items as shown in our supporting brief on page 2, she received no consideration.

In view of the admissions in the opinion of the Court of Appeals, the amount involved and the manner in which the trial was conducted, we feel that petitioner was denied her fundamental rights and justice under the Fourteenth Amendment, and that she was stripped of her real remedy by purely arbitrary and capricious exercise of the power guaranteed to her.

The effect of such an opinion as was rendered in the state court was to establish a precedent for the bench and bar of the state of Kentucky heretofore condemned by every prior decision of that court and the courts of every other jurisdiction.

We again respectfully submit that the writ of certiorari should be granted and the judgment and opinion below reversed.

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ALLEN PREWITT,
Frankfort, Ky.,
Of Counsel.

January 27, 1944.

(4)

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No. 499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 499

PATRICIA R. O'BRIEN,

Petitioner,

vs.

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL; EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN and RICHARD J. WHELAN, Executors Under the WILL OF ELIZABETH GRAVES O'BRIEN, Deceased; THE FIDELITY & COLUMBIA TRUST CO. and the LOUISVILLE TRUST COMPANY, Co-Administrators of the Will Annexed of John A. O'Brien, Deceased; and EDWARD J. O'BRIEN & CO., a Co-partnership Composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien; and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the WILL OF ELIZABETH GRAVES O'BRIEN, Deceased,

Respondents.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

INDEX

PAGE

Opinion below 2
Jurisdiction 2
Statement 2
Denial of due Process of Law..... 4
Effect of denial of due process of law..... 6
Reasons for granting the writ..... 7
Conclusion 11
Appendix 14

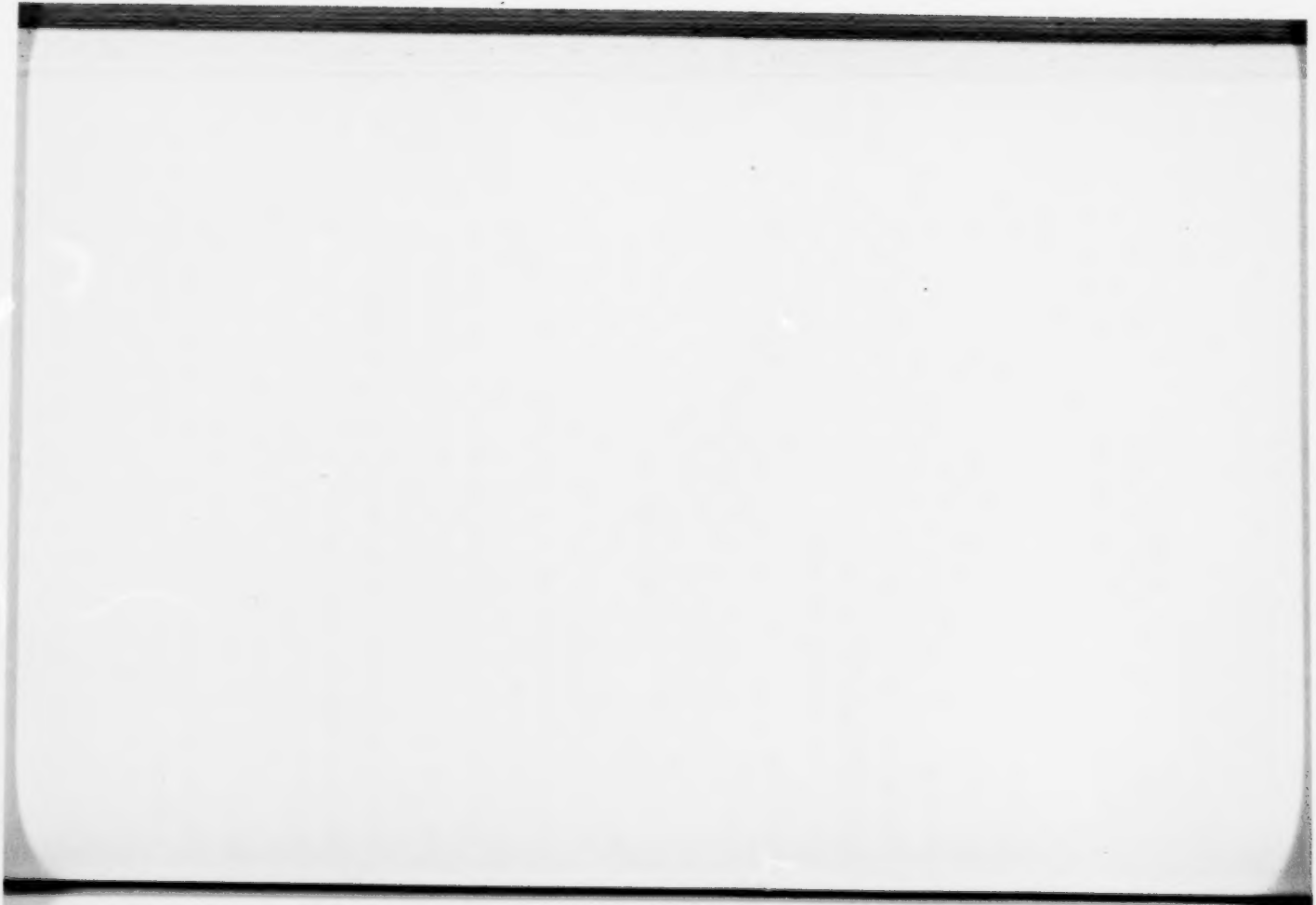
CITATIONS.

Cases:

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673..... 9
Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U. S. 326..... 11
Cumberland Coal Co. v. Board, 284 U. S. 23..... 11
Georgia Railway & Electric Co. v. Decatur, 295 U. S. 165 8
Great Northern Ry. v. Sunburst Co., 287 U. S. 358... 11
Norris v. Alabama, 294 U. S. 587..... 11
United Gas Co. v. Texas, 303 U. S. 123..... 8

Statute:

Section 528 of Carroll's Kentucky Code of Civil Practice 14



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Respondents.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

The petitioner, Patricia R. O'Brien, respectfully prays for a reconsideration by the court of its order of January 31, 1944, denying certiorari herein. The time for filing a petition for rehearing has been extended by this Court to and including May 4, 1944.

This petition is filed for a writ of certiorari to review the judgment of the Court of Appeals of the State of Kentucky entered in the above entitled cause.

Jurisdiction.

The judgment of the Court of Appeals of Kentucky was finally entered on June 25, 1943, affirming the judgment of the Circuit Court of Jefferson County, Kentucky (Tr. Rec. Vol. III, p. 410), dismissing plaintiff's complaint praying for the rescission and cancellation of the sale of her deceased husband's interest in a family partnership on the ground that she had been induced to make the sale because of misrepresentations and concealment of the facts showing the true value of that interest. The opinion of the court on rehearing rendered June 25, 1943, is reported in 294 Ky. 793; 172 S. W. 2d. 595.* The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended, on the ground that the petitioner has been deprived of her right, title and privilege to property without due process of law and has been denied the equal protection of the laws in contravention of the provisions of the Fourteenth Amendment of the Federal Constitution. This question was raised and decided upon the merits adversely to petitioner by the Court of Appeals of Kentucky, the highest court of that state in which a decision in this suit could be had.

Statement.

The petitioner is the widow of John A. O'Brien who died on January 1, 1934. John A. O'Brien was the youngest son of Edward J. O'Brien, Sr. who died in 1928 and who, prior to his death formed and operated a tobacco business at Louisville, Kentucky. After his death the business continued to be conducted as a co-partnership comprised of his widow, four sons and a daughter, under the

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*We are unable to obtain Volume 294 of Official Kentucky reports. Therefore the opinion is subsequently referred to as reported in 172 S. W. 2d 595.

firm name of Edward J. O'Brien & Company. The amended articles of co-partnership (Exhibit 24) provided that the basis of the sale of the interest of a deceased partner should be "the value of the interest, *as shown by the books of the Company*, or by appraisement, plus profits and interest, if any" (Tr. R. Vol. III, p. 382).

On the death of John A. O'Brien, the petitioner as his widow was the sole beneficiary of his estate. After many preliminary negotiations over an extended period, during which the petitioner repeatedly expressed her desire not to sell her husband's interest (approximately one-quarter) in the partnership (Tr. R. Vol. III, p. 383), between November 5th and 15th, 1935, petitioner signed an agreement to sell her husband's interest to his brothers in the partnership for $380,000.00 (Tr. R. Vol. III, p. 372). This agreement was made with the contemporaneous understanding that the brothers would waive a specious claim to proceeds of insurance policies on her husband's life wherein petitioner was named as beneficiary and that she would receive these proceeds as the beneficiary named in the policies.* The acceptance of the offer was signed by the brothers in the same period and in February 1936, the sale was completed and subsequently the $380,000.00 was paid to the co-administrators.

The consideration of $380,000.00 for John's interest in the partnership was agreed to by petitioner upon the representation by the surviving brothers and partners that the market value of John's interest in June and November, 1935, was $425,649.45. This representation was in writing and was introduced in evidence at the trial of this case as Exhibit 22. The exhibit is set forth in the original petition for certiorari at page 30.

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*See opinion of Court of Appeals of Kentucky, 172 S. W. 2d 595, 604.

Several months later the petitioner obtained information which convinced her that the value of her husband's interest in the partnership at the time of the sale was much greater than represented by his brothers. After the administrators of her husband's estate had refused to bring suit for rescission of the sale, on March 11, 1937 (Opinion, Court of Appeals, 172 S. W. 2d, 595, 597), petitioner filed her complaint in this case asking that the sale be rescinded and cancelled because of the said misrepresentation of the true value of the interest of her deceased husband in the partnership and because of the concealment of vital facts with respect thereto and a failure of the surviving partners to discharge the legal duty* imposed upon them by the partnership relation to make a full disclosure to her of all facts concerning the value of the interest at the time of the sale (Tr. R. Vol. I, p. 74).

Denial of Due Process of Law.

Shortly before the trial of this case, petitioner's counsel filed her motion with the trial court for the issuance of a subpoena duces tecum to require defendant partners to bring into court the vital books and records of the partnership, listed in the motion (Tr. R. Vol. III, pp. 256, 257), which would show the true value of the interest of John A. O'Brien. The motion was supported by the affidavit of a certified public accountant that the books of the partnership were necessary in the determination of the value of the interest of the deceased partner and that audits made by the surviving partners for some other purpose were insufficient (Tr. R. Vol. III, pp. 261, 272). On February 29, 1940 this motion was denied with respect to every original book, document or record of the partnership which would

*That the partners had this duty is found by the Court of Appeals of Kentucky, 172 S. W. 2d 595, 601.

show the value of its property, except that the motion was allowed as to tobacco inventories for the year 1935 (Tr. R. Vol. III, pp. 273, 274). The tobacco inventories as shown by the 1935 audit of the partnership gave valuations at "cost which was lower than market" (Tr. R. Vol. III, p. 301; Opinion of trial court, Tr. R. Vol. III, p. 306).

However, a few days later when petitioner's counsel presented another motion for a subpoena duces tecum which sought information as to the value of the tobacco on hand as shown by the inventory, the Court on March 20, 1940, denied this motion and on its own motion entered an order expunging that part of its prior order requiring the defendant partners to produce the tobacco inventories for 1935 (Tr. R. Vol. III, p. 297).

The result of the trial court's action was that petitioner had no evidence at the trial with which to show the true value of her husband's interest in the partnership or even to show the market value of and the profit from the sale of the stock in trade of one of the largest leaf tobacco businesses of the world. The cost value of the tobacco inventory alone was over $900,000.00 (Tr. R. Vol. III, p. 301). Evidence of the market value was barred by the denial of the subpoena *duces tecum*.

The case proceeded to trial with the petitioner being forced to rely on certain audits of the partnership books which the surviving partners had caused to be made long prior to the trial of the case and which did not bear any relation to the ascertainment of the value of John A. O'Brien's interest. They were made for other purposes. These audits, of course, were hearsay evidence, and did not afford petitioner an opportunity to examine the partnership books or to show the court what the original books would reveal in support of the claims set forth in her complaint.

By this denial of the procedural process of subpoena duces tecum which the Kentucky statute authorizing such process (see Appendix) intended to make available to every litigant, the petitioner was prevented from obtaining and presenting to the court the only genuine and competent evidence that could have proved her claims of misrepresentations, concealment and non-disclosure.

This denial of due process was not an exercise of discretionary judgment as to relevancy and competency of the documentary evidence which petitioner sought but was a denial of her right to secure the only competent evidence vital to her proofs.

Effect of the Denial of Due Process.

The articles of partnership provided that the interest of a deceased partner should be ascertained from the books of the company or by appraisement. This is exactly what the trial court rendered impossible by its denial of petitioner's motion for a subpoena duces tecum to produce the original books and records of the partnership. The futility of petitioner's position in her efforts to prove the charges in her complaint is well described by the court which denied her due process:

> **"Caution however! We must remember that Patricia's case is circumscribed by scope of the discovery allowed. If she was limited in her discovery practically to the audits, it is unreasonable to expect her to develop anything outside the reports themselves." (Tr. R. Vol. III, p. 390.)**

The courts's intimation that if anything had occurred at the trial to indicate that the audits were inaccurate or misleading he might have enlarged the scope of discovery, was meaningless since it had already prevented the peti-

tioner from obtaining the only evidence that could have shown whether the audits were inaccurate and misleading.

The trial court had already found (1) that petitioner had insisted that her husband's interest remain in the partnership for five years (Tr. R. Vol. III, p. 383); (2) that she was entitled to full information about the value of that interest before the sale was made (Tr. R. Vol. III, p. 384); (3) that there was a positive duty of disclosure relative to the value of that interest (Tr. R. Vol. III, p. 387); (4) that petitioner had wanted an independent audit of the books (Tr. R. Vol. III, p. 389); (5) that the correctness of the audits furnished petitioner was in dispute (Tr. R. Vol. III, p. 390); and (6) that any audits and inventories furnished petitioner did not list "good will" as an asset (Tr. R. Vol. III, p. 390). There is not any evidence or any finding in the record that defendants ever consented to an audit by the petitioner. All of this notwithstanding, followed by the admission of the trial court that petitioner's case was circumscribed by the scope of discovery allowed, the court, on May 23, 1940, entered its order dismissing petitioner's complaint (Tr. R. Vol. III, p. 410).

Reasons for Granting the Writ.

The primary question in this case does not involve the rather common contention that a trial court ruled erroneously on the admissability of certain evidence. Here the surviving partners in a business purchased at an unconscionably low price a decedent partner's interest from his widow, who was his beneficiary. Such sale was induced by the misrepresentation, concealment and fraud of the surviving partners. The widow, the petitioner here, brought action to rescind. To prove her case upon the trial, she vitally needed for evidence the original books and records of the partnership. The surviving partners refused to pro-

duce them. To procure this evidence, she applied to the trial court for the subpoena duces tecum, as provided by Kentucky's Code of Civil Practice. This process the Court denied in violation of her rights to due process of law and equal protection of the law, as provided in the 14th Amendment.

This Court has never been reluctant to grant certiorari in cases where the claim of a denial of due process of law has been advanced, even where the denial asserted was not as closely identified with the basic right of due process and equal protection of the law guaranteed by the Fourteenth Amendment as it is in the instant case.

In the case of *Georgia Railway & Electric Co.* v. *Decatur*, 295 U. S. 165, certiorari was granted because the trial court excluded evidence offered by petitioner to show that the improvement on account of which taxes were being assessed against the petitioner really impaired the value of petitioner's property. This was held to be a deprivation of property without due process of law. In the instant case petitioner was denied her right under the procedural statute of Kentucky to obtain evidence to establish the value of her husband's interest in the partnership and thereby was prevented from having such evidence even considered by the court. Thus petitioner was denied the right even to attempt to prove that the representations and hearsay evidence (audits) were incomplete and did not disclose either the book, market, or appraised value of her husband's interest.

In the case of *United Gas Co.* v. *Texas*, 303 U. S. 123, certiorari was granted on a ground closely akin to that in the instant case, namely that the petitioner had been denied *procedural due process*. In the *United Gas Co.* case apparently all of the evidence submitted by the petitioner was admitted but it was contended, among other things, that a

determination by a jury of the value of petitioner's property and of rates reasonable for it to charge did not afford a fair hearing on complicated issues under the Fourteenth Amendment. In the instant case the procedural rights provided by the Kentucky statutes were denied to the petitioner.

The denial of due process of law in the instant case goes beyond procedural issues and constitutes a denial of petitioner's right to present her case in court. This right is guaranteed to her by the Fourteenth Amendment. In the case of *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, the court said at page 681:

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. * * * But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."

Many other cases where this court has granted certiorari on the contention of a denial of due process of law could be cited here and are cited in the original petition for certiorari at page 39.

In the instant case the completeness of the denial of due process is vividly pictured in the opinion of the Court of Appeals of Kentucky, 172 S. W. 2d 595. At page 605, the court said:

> "The articles provided that the basis of sale of a deceased partner's interest at the expiration of five years should be 'the value of the interest as shown by the books of the company or by appraisement plus profits and interest, if any.' This definite contract between all the partners as to the alternative bases of purchase and sale cannot be ignored."

Also at page 608:

> "**Moreover, this is not a settlement of a partnership upon dissolution. It is a question of valuing an interest in a continuing concern and the challenge of the fairness of the firm's manner of bookkeeping.**"

On petition for rehearing on an extended opinion of the Court of Appeals of Kentucky, petitioner raised the legal point that by the denial of her motion for a subpoena *duces tecum* to produce the books of the partnership, she had been denied due process of law under the Fourteenth Amendment. The court decided this point in the following language at page 609:

> "If the rulings of the court should be regarded as erroneous, such action does not in our opinion offend constitutional rights. Due process of law does not assure a litigant against a wrong interpretation of the law, especially procedural, or against judicial error in respect to the admission or exclusion of evidence."

Thus, after judicial pronouncement that the value of the petitioner's husband's interest in the partnership must be determined by the books of the partnership, that the question in the case was the value of that interest as shown by those books, and that the suit was a "challenge of the fairness of the firm's manner of bookkeeping"; the denial of due process of law to petitioner, through the trial court's denial of her motion for a subpoena *duces tecum* to bring in the books and original records, appears in sharp relief in a recorded opinion in contrast with the irrelevant statement in the same opinion that due process does not assure a litigant against a wrong interpretation of the law.

The petitioner's assertion of denial of the due process is not based on an asserted erroneous interpretation of the law. It is based on a denial to her of the right to prove,

by the only evidence in existence, her claim of fraud, misrepresentation, concealment and failure to disclose.

Since the federal question of denial of due process of law was raised in the highest Court of Appeal in the State of Kentucky, even though in a petition for rehearing, and was passed on by that court in its extended opinion, this Court has jurisdiction to grant certiorari and to consider and decide the substantial federal question that is here involved. *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, 24; *Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry. Co.,* 228 U. S. 326, 334; *Great Northern Ry.* v. *Sunburst Co.,* 287 U. S. 358, 367.

Furthermore, in the case of *Norris* v. *Alabama,* 294 U. S. 587, this Court held that it has a judicial duty to review the federal right that was denied to petitioner in the instant case. At pages 589 and 590 of the opinion in the *Norris* case the court said:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights.

In conclusion, it is pointed out that petitioner was induced to sell her husband's interest in the partnership for $380,000.00, upon written representations of the value of that interest which petitioner contended in the trial court were inaccurate and incomplete. These representations were accompanied by (1) threats to deprive petitioner of her insurance by the assertion of an alleged trust, probably

created by coercion, and subsequently revoked (Court of Appeals Opinion, 172 S. W. 2d 600, 603-604); (2) advising the insurance companies of the specious claim under the revoked insurance trust, which had the effect of depriving petitioner of $150,000.00 of insurance until she accepted the representations made as to the value of the partnership interest (same opinion, p. 604); (3) threats to destroy this interest by incorporation of the business (same opinion, p. 604); (4) threats to contest her husband's will and render it nugatory (same opinion, p. 604).

The petitioner contended in the trial court that the true value of her husband's interest in the partnership was more than $600,000.00 (Complaint, Tr. R. Vol. I. p. 98) but she was denied the right to have the original books of the partnership produced in court so that the true value of her husband's interest could be established. The trial court in denying her motion for a subpoena duces tecum to produce these books deprived her of due process of law and of her right to that kind of a hearing guaranteed by the Fourteenth Amendment.

It is respectfully submitted, therefore, that the order denying the petition for certiorari be vacated and that this petition be granted.

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I certify that this petition is presented in good faith and not for delay.

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APPENDIX.

Section 528 of Carroll's Kentucky Code of Civil Practice:

> "The process by which the attendance of a witness is required is a subpoena. It is a writ directed to the sheriff, requiring him to summon the person named therein to attend at a particular time and place, to testify as a witness. It may, when the court or the judge thereof so directs, require the witness to bring with him any book, writing or other thing under his control, which he is bound by law to produce in evidence."